



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 1 OF 2018

REPUBLIC.....PROSECUTOR

-VERSUS-

JOHN MWITA NYAMBATI.....ACCUSED

JUDGMENT

1. **John Mwita Nyambati**, the accused herein, was arraigned before this Court on 24/01/2018 and faced an information of murder of **Charles Weirema Waibina** (hereinafter referred to as '**the deceased**'). The particulars of the offence were as follows:-

“On the 29th day of September 2017 at about 8:30pm at Kobinto village, Nyamotambe S/Location, Bukira Central in Kuria West District within Migori County in the Republic of Kenya murdered Charles Weirema Waibina”

2. The accused denied committing the offence and the case was set for hearing. The hearing took place at Kehancha Law Courts with a view of expediting the trial and also to reduce the distance the witnesses had to cover to attend Court at Migori Law Courts. I am indeed grateful to the support accorded by the prosecution, the police and the Defense Counsel **Mr. Muniko** which enabled the trial to be completed in a record time.

3. Six witnesses testified in a bid to prove the prosecution's case. **Dr. Awinda Victor Omollo** who conducted a post mortem examination on the body of the deceased testified as **PW1**. The mother to the deceased one **Lucia Masiaga Waibina** testified as **PW2** whereas a sister to the deceased one **Jackline Sinda Waibina** testified as **PW3**. **Anna Kwamboka Marwa** testified as **PW4**. **No. 73746 PC Omar Mohammed** attached at Isebania Police Station testified as **PW5** and the investigating officer **No. 49084 Sgt. Samson Kataka** testified as **PW6**. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified before the trial court.

4. The prosecution's case was that in the evening of 29/09/2017 at Kobinto Centre the accused who was in the company of one **Sammy Mukahawa** (who is still at large and hereinafter referred to as '**Sammy**') attacked the deceased as he walked home and fatally stabbed the deceased with a knife on his back. The deceased was in the company of **PW3** who had also gone to the Centre to buy charcoal. **PW3** had first seen the deceased inside a hotel ran by **Sammy** which was just adjacent to the kiosk she bought the charcoal from. **PW4** who was the mother of **Sammy** testified that she was inside the hotel when the deceased walked in shouting and ordered for food. That, the deceased ordered for two chapatis and tea and shortly thereafter stood and shouted that he wanted to deal with the accused who was also known as **Joseph**. The accused then appeared at the door of the hotel and told the deceased that he did not want any confrontation with the deceased and urged the deceased to continue taking his food. The accused then left and when the deceased finished taking his food he also left the hotel. The accused briefly talked to **PW3** at the kiosk which was next to the hotel and left. The deceased then accompanied his sister (**PW3**) as they walked home.

5. It was a night of bright moonlight and **PW3** could clearly see. As **PW3** walked home with the deceased she was a few paces behind the deceased. **PW3** then saw the accused in the company of **Sammy** walk towards them. As they passed her **PW3** walked faster and caught up with the deceased. When the two caught up with them **PW3** saw the accused remove a knife from his pocket and stabbed the deceased on his back. He then pushed him and as the deceased fell, they disappeared. The incident occurred within the vicinity of the hotel owned by **Sammy**. **PW3** raised alarm and people gathered, but no assistance was given to the deceased who died almost immediately. **PW3** also called **PW2** and other family members and informed them of the incident.

6. The police were called and the body was collected and taken to the Migori County Referral Hospital Mortuary where it was later transferred to Pastor Machage Memorial Hospital Mortuary where **PW1** conducted the post mortem examination 04/10/2017. **PW1** formed the opinion that the death of the deceased was caused by the stab wound at the back which punctured the left lung and left atrium. A Post Mortem Report was produced as an exhibit.

7. **PW6** investigated the case and recorded statements from several witnesses. On completion of the investigations **PW6** formed the opinion that the accused and **Sammy** were to be charged with the murder of the deceased. However, both had fled their homes and efforts to find them were put in place. It was **PW5** who arrested the accused in Isebania town on a tip off from two members of public. He then handed over

the accused to PW6. According to PW6 Sammy was still at large when he testified.

8. PW6 interrogated the accused. The accused then led PW6 to his mother's house and retrieved a knife (the suspected murder weapon) and handed it over to PW6. An inventory was prepared and signed by PW6, the accused, a brother to the accused among other officers. The inventory was produced as an exhibit as well as the knife. PW3 recognized the knife as the one the accused had stabbed the deceased with as she had previously seen it used at Sammy's hotel. PW6 then escorted the accused for mental assessment which confirmed that he was fit to stand trial and he thereafter charged him accordingly. PW6 produce the Mental Assessment Report, the Inventory and the knife as exhibits. The prosecution then closed its case.

9. On being placed on his defense the accused gave a sworn statement where he denied committing the offence and contended that he did not know the deceased or at all and that the charge was based on a mistaken identity. He called no witnesses and prayed that the charges be dismissed.

10. At the close of the defense case the matter was left to Court for this judgment.

11. It is on the basis of the above evidence that this Court is called upon to decide on whether or not the accused is guilty of the information of murder.

12. The offence facing the accused persons is an information of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**, Chapter 63 of the Laws of Kenya. For the prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an accused person. Those ingredients are as follows: -

(a) ***Proof of the fact and the cause of death of the deceased;***

(b) ***Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused which constitutes the 'actus reus' of the offence;***

(c) ***Proof that the said unlawful act or omission was committed with malice afterthought which constitutes the 'mens rea' of the offence.***

I will now consider the above ingredients as follows: -

(a) Proof of the fact and cause of death of the deceased:

13. As to whether the deceased indeed died, the prosecution availed PW1, PW2, PW3, PW4 and PW6 in such proof. I am hence satisfied that indeed the deceased herein died. On the cause of the death of the deceased, PW1 confirmed that the deceased sustained one fatal stab from the back that shattered the left lung and atrium. In the absence of any contrary evidence or contestation I find the opinion of PW1 as the cause of the death of the deceased.

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused: -

14. Apart from the evidence of PW4 that the deceased shouted and demanded to square it out with the accused at the hotel, the other evidence touching on the accused is that of PW3. The incident occurred at night and PW3 stated that it was night of bright moonlight and she could clearly see. PW3 knew the accused and Sammy and even referred to them by their names. To PW3 the accused and Sammy hailed from her neighborhood and not only knew them well she closely, but also regularly interacted with them. PW3 also stated that she met and briefly talked to the accused outside the hotel as she bought the charcoal. PW3 was also able to recognize the two as they walked towards her and the deceased. The two passed PW3 and PW3 managed to up her paces and caught up with the deceased. She then witnessed the accused remove the knife and stab the deceased on the back once. That single stab was confirmed by PW1 during the post mortem examination.

15. In his defense, the accused denied being at the Kobinto Centre on 29/09/2017 or even knowing the deceased. He contended that he was then working at Isebania at a construction site. PW3 testified of seeing the accused at the Kobinto Centre in the evening in issue and that the accused knew the deceased quite well. That evidence was rightly corroborated by that of PW4 who confirmed witnessing the accused talking to the deceased in the hotel at the Centre. I hence find the contestation by the accused that he was not at the Centre on the date and time in issue and not knowing the deceased to be untruthful. There is ample evidence that the accused was at the Centre as alleged and that the accused knew and even talked to the deceased at the hotel. The defense is hence unsustainable and is for rejection.

16. As to whether it was the accused who stabbed the deceased, my attention is readily drawn to the caution in dealing with such single-witness evidence on recognition. The caution is that such evidence must be carefully tested lest it may cause an injustice to the accused since even close relatives may be victims of mistaken identity. (See **Wamunga Vs Republic (1989) KLR 426**, **Nzaro vs Republic (1991) KAR 212**, **Kiarie vs Republic (1984) KLR 739**, the English case of **R -vs- Turnbull & Others (1973) 3 ALL ER 549** among others).

17. I have carefully considered the evidence of PW3 in light of that of PW1 and PW4 and I find that the totality of that evidence outweighs the accused person's defence that he did not stab the deceased. There was adequate corroboration of the evidence of PW3 by that of PW1 and PW4. I hence have no hesitation in finding that it was the accused who, by way of an unlawful and unjustified act, caused the death of the deceased by stabbing him on the back. The second limb is also answered in the affirmative.

(c) Proof that the said unlawful act or omission was committed with malice afterthought: -

18. I as well have no hesitation in finding that no malice aforethought was proved in this case. The incident was an isolated one. There was

no evidence of running bad blood between the deceased and accused. Infact there is evidence that they were friends. That aspect came out when the accused told the deceased that he had no issue with him at the hotel after the deceased invited the accused to a confrontation. The accused also stabbed the deceased only once and the motive cannot be readily established from the evidence. Why did the deceased invite the accused to a confrontaion? Could they have previously differed? All those are unanswered questions make this Court unable to infer malice on the part of the accused.

19. In reaching the foregone finding I am guided by **Section 206** of the **Penal Code** which defines '**malice aforethought**' and *inter alia* the following decisions of the Court of Appeal. In the case of **Joseph Kimani Njau vs R (2014) eKLR**, the Court of Appeal in concurring with an earlier finding of that Court (but differently constituted) in the case of **Nzuki vs R (1993) KLR 171**, held as follows: -

“Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused;-

i) The intention to cause death;

ii) The intention to cause grievous bodily harm;

iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.

It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed The mere fact that the accused’s conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder. (See Hyman vs. Director of Public Prosecutions (1975)AC 55”. (emphasis added).

20. In the case of **Nzuki vs. Republic (1993)KLR 171**, the accused person had dragged the deceased out of the bar and fatally wounded him with a knife. There was no evidence as to their having been any exchange of words between Nzuki and the deceased neither was there any indication as to why Nzuki went into the bar and pulled the deceased straight out and stabbed him. It was rightly observed in that case that the prosecution was not obliged to prove malice but just as the presence of motive can greatly strengthen its case, the absence of it can weaken the case. The Court of Appeal in allowing an appeal and substituting the information of murder with manslaughter observed: -

“There was a complete absence of motive and there was absolutely nothing on record from which it can be implied that the appellant had any one of the intentions outlined for malice aforethought when he unlawfully assaulted the deceased with the fatal consequences. Other than observing that the appellant viciously stabbed the deceased and in so doing intended to kill or cause him gracious harm, the trial court did not direct itself that the onus of proof of that necessary intent was throughout on the prosecution and the same had been discharged to its satisfaction in view of the circumstances under which the offence was committed. Having not done so, we are uncertain whether malice aforethought was proved against the appellant beyond any reasonable doubt. In the absence of proof of malice aforethought to the required standard, the appellant’s conviction for the offence of murder is unsustainable. His killing of the deceased amounted only to manslaughter.”

21. As the foregone evidential analysis does not therefore support a conviction in respect of the information of murder, the accused is hence found not guilty of the murder of the deceased and he is hereby acquitted. However, it is clear that the deceased lost his life as a result of the actions of the accused, but of course without any malice aforethought.

22. In view of the provisions of **Section 179(2)** of the **Criminal Procedure Code**, Chapter 75 of the Laws of Kenya and looking at the evidence on record and as analysed hereinbefore, this Court finds the accused person guilty of the offence of **Manslaughter** contrary to **Section 202** of the Penal Code and he is accordingly convicted accordingly.

23. These are the orders of this Court.

DELIVERED, DATED and SIGNED at MIGORI this 14th day of February, 2019.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Mr. Muniko Counsel instructed by the firm of Messrs. Muniko & Company Advocates for Accused.

Mr. Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Evelyn Nyauke – Court Assistant