



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CRIMINAL CASE NO. 15 OF 2018

REPUBLIC.....PROSECUTOR

-VERSUS-

PASCAL BOKOBORA NYAHORE..... ACCUSED

JUDGMENT

1. **Samwel Manyera Sigiria** (hereinafter referred to as '**the deceased**'), died as he underwent treatment resulting from an injury he sustained in an attack on the night of 22/06/2018 while outside his house in Kehancha town with his friend when two armed persons confronted them.

2. Upon conclusion of the investigations by the police **Pascal Bokobora Nyahore**, the accused person herein, was arraigned before this Court and faced the information on the murder of the deceased. The plea was taken on 05/07/2018 where he denied committing the alleged offence. The case was thereafter set for hearing.

3. The trial was short as the prosecution called five witnesses in support of its case. The father to the deceased testified as **PW1**. He was **Julius Sigiria Mwita**. A cousin to both the accused person and the deceased testified as **PW2**. He was **Ayub Boke Matiko**. Another cousin to the deceased and who was in the company of the deceased during the attack testified as **PW3**. He was **Paul Muhiri Maroa**. **Dr. Awinda Victor Omolloh** who conducted the post mortem examination on the deceased's body testified as **PW5** whereas the Investigating Officer **No. 49084 Sgt. Samson Kataka** testified as **PW4**. I will henceforth refer to the witnesses in the numerical sequence they testified before Court.

4. The prosecution's case was that at around 09:00pm on 22/06/2018 the deceased and **PW3** who lived together at Stadium area within Kehancha town were washing their clothes outside their house when the accused person who was in the company of one **Paul Monanka** appeared and ordered the deceased to sit down in Kiswahili language saying '*kaa chini*'. The deceased obliged. That, there was bright moonlight and **PW3** readily recognized the accused person and the other person who both lived within the area. **PW3** had known the accused person for about one year and was also familiar with his voice. **PW3** stood about 4 metres from where the accused person and his companion were with the deceased. According to **PW3** the accused person had come to their house that afternoon and returned in the night with his companion to attack the deceased.

5. The accused person then hit the deceased with a club on the head and the deceased fell. As the two continued assaulting the deceased **PW3** ran away raising alarm. **PW3** also saw one of the attackers remove money from the pockets of the trousers the deceased wore.

6. As neighbours gathered **PW3** returned to the scene and saw the accused person and his companion escape with the club. By then the deceased lay motionless on the ground. **PW3** then called the mother of **PW2** and informed her of the incident. On learning of the incident from his mother **PW2** rushed to the scene and found the deceased bleeding profusely. With the aid of **PW3** and others they rushed the deceased to Kehancha Mother and Child Hospital where the father of the deceased (**PW1**) worked as a security guard. The deceased was assessed and referred to Kehancha District Hospital where **PW1**, **PW2**, **PW3** and others rushed him to. Due to the seriousness of the injuries sustained the deceased was referred to Migori County Referral Hospital for further attention. He was then referred to Kisii County Referral Hospital for an X-Ray examination and on their way back to Migori County Referral Hospital the deceased died. The body was taken to Migori County Referral Hospital Mortuary for preservation and further police action.

7. **PW1** and **PW3** reported the matter to the Kehancha Police Station on 23/06/2018. **PW4** was called by the OCS and took over the investigations of the case. **PW4** was also informed that the accused person had been arrested and was in police cells. He went to the station and took over the case and confirmed that the accused person was in custody. He recorded statements from witnesses and witnessed a post mortem examination conducted by **PW5** at Migori County Referral Hospital Mortuary on 27/06/2018 where **PW5** opined that the cause of death of the deceased was severe head injury due to assault. **PW4** analyzed the evidence and formed an opinion that the accused person be charged with the murder of the deceased. He then escorted the accused person to Migori County Referral Hospital for mental assessment on 05/07/2018 before the accused person pleaded to the information although the accused person was formally presented to Court on

29/06/2018. The accused person was then tried.

8. At the close of the prosecution's case the accused person was placed on his defence. He opted to give an unsworn statement. He denied committing the offence and stated that in the night of 22/06/2018 he was in the company of **Paul Boke Chacha** whom he escorted him to his house before returning to his house to sleep. That, he later heard screams from the neighbourhood and rushed there only to see the deceased lying on the ground bleeding. No one seemed to know what had happened to the deceased who was taken to hospital as he returned to his home and slept.

9. It is on the foregone evidence that this Court is called upon to render this judgment. I have carefully considered the evidence on record as well as the exhibits. As the accused person is charged with the offence of murder, the prosecution must prove the following three ingredients:

(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 consider each of the ingredients separately.

10. As to the proof of the fact and cause of death of the deceased, it is not in dispute that the deceased in this matter died. That position was confirmed by PW1, PW2, PW3 and PW5. The first limb is hence answered in the affirmative.

11. As to the cause of the death of the deceased, PW5 produced a Post Mortem Report which he prepared upon conducting the post mortem examination himself. The said report gave the possible cause of death of the deceased to have been severe head open head injury due to assault. The injury was about 3cms long and had caused a comminuted fracture of the skull. It had also distorted the brain tissue. As there is no contrary evidence to that end this Court so concurs with that medical finding. The other limb is likewise answered in the affirmative.

12. Turning to the second ingredient; that is to ascertain whether the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused person, I am aware that the eye-witness account touching on the accused person's involvement in the death of the deceased was by PW3 who was with the deceased at the scene of murder. All the other witnesses only came up after the occurrence of the actions complained of. PW1 is hence the sole identifying witness in this case.

13. In such an instance and given that the identification of the assailant is contested this Court is under a legal duty to weigh the evidence of PW3 who is the only identifying witness with such greatest care and to satisfy itself that in all circumstances, it is safe to act on such evidence on recognition. This is premised on the settled principle in law that evidence of visual identification/recognition in criminal cases can cause miscarriage of justice if not carefully tested. The Court of Appeal in the case of **Wamunga vs Republic (1989) KLR 426** stated as under: -

It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.

It was also held in **Nzaro vs Republic (1991) KAR 212** and **Kiarie vs Republic (1984) KLR 739** by the Court of Appeal that evidence of identification/recognition at night must be absolutely watertight to justify conviction.

14. In **R -vs- Turnbull & Others (1973) 3 ALL ER 549**, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said:

... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?... Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

15. The above does not mean that there cannot be safe recognition even at night. The Court of Appeal in **Douglas Muthanwa Ntoribi vs Republic (2014) eKLR** in upholding the evidence of recognition at night held as follows: -

On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified: -

"I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and correctly identified or recognized by PW1, the complainant."

The Learned Judge further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error...

16. Again the Court of Appeal in **Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another vs R (unreported)** had this to say on the evidence of recognition at night: -

We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as 'neighbours from the village', that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non-recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants.

17. On corroboration, **Section 124 of the Evidence Act, Cap. 80** of the Laws of Kenya calls for a conviction in a criminal trial to be based on corroboration by any other material evidence save in sexual offences. Corroboration is hence not limited to only eye-witnesses accounts. Corroboration can be found in any other material evidence before Court. I am alive to the persuasive decision of the Court of Appeal of Uganda in **Obwana & Others vs. Uganda (2009)2 EA 333** where in dealing with the issue of conviction in the absence of corroboration the Court presented itself thus:

.....This need for corroboration, however, does not mean that no conviction can be based on visual identification evidence of a sole identifying witness in the absence of corroboration. Courts have powers to act on such evidence in absence of corroboration. But visual identification evidence made under difficult conditions can only be acted on and form a basis of conviction in the absence of corroboration if the presiding judge warns himself/herself and the assessors of the dangers of acting on such evidence."

18. PW1 gave a candid narration of what transpired on the material day. The incident occurred outside the house where both PW3 and the deceased lived. There was bright moonlight and PW3 stated that visibility was not impaired. PW3 also stated that he had seen the accused person during the day when he came to their place and returned in the night. It was PW3 who also stated that he knew the accused person so well as they lived in the same neighbourhood. The accused person in his defence so confirmed. PW3 did not only know the accused person physically. He could also recognize his voice. He heard him ordering the deceased to sit down in Kiswahili. PW3 was barely 4 metres from where the accused person and the deceased were and he saw the accused person who held a club hit the accused person on the head and the deceased fell. The deceased never regained consciousness. When PW3 raised alarm the twin attackers escaped. PW3 readily gave the names of the attackers as the accused person and Paul Monanka to those who answered his call for help.

19. The accused person denied the offence and stated that he only arrived at the scene after the deceased had been attacked and many people had gathered. The accused person indeed admitted that he had been with Paul in that night and that he had escorted Paul to his house since it was night and Paul did not have a torch. It is that position that is to be weighed against the prosecution's evidence.

20. This Court observed the demeanor of the witnesses as they testified. The prosecution witnesses were candid and straight-forward. They also withstood and were not shaken in cross-examination. This Court formed the opinion that the witnesses were truthful and credible and their evidence reliable. In taking the caution aforesaid, I am satisfied beyond any doubt and hence find and hold that the accused person was rightly placed at the scene as one of the two who attacked the deceased. The identification of the accused person by PW3 was not in error.

21. I must also add that although there was no corroboration of the PW3's eye account testimony by another eye-witness, PW3's evidence was nevertheless corroborated by the medical evidence of PW5 who confirmed that the deceased had been injured on the head just like what PW3 stated. The second ingredient is hence proved.

22. I will now consider the third limb as to whether there was malice aforethought on the part of the accused in committing the act complained of in this case. As the safest tradition the starting point is the law. **Section 206** of the Penal Code defines '*malice aforethought*' as follows:

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.**

23. The Court of Appeal has also dealt with this aspect on several occasions. 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).

24. 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 conviction 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 grievous harm, the trial court did not direct itself that the onus of proof of that necessary intent was throughout 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.

25. In this case there is no evidence that the accused person and his companion planned to kill the deceased. It seems that the accused person and his companion attacked the deceased to rob him and that is why PW3 saw one of the attackers remove money from the trousers' of the deceased. The attackers also disappeared immediately PW3 raised alarm. I hence find no evidence of malice aforethought in this case and the third ingredient of murder fails.

26. A fortiori, the foregone analysis does not therefore support a conviction in respect of the information of murder. The accused person is hence found not guilty of the murder of the deceased and he is hereby acquitted. However, the deceased lost his life as a result of the actions of the accused person, but of course without any malice aforethought.

27. 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 analyzed hereinbefore, this Court finds the accused person guilty of the offence of **Manslaughter** contrary to **Section 202** of the Penal Code and he is convicted accordingly.

28. These are the orders of this Court.

DELIVERED, DATED and SIGNED at MIGORI this 16th day of May 2019.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Mr. Mwita, Counsel for the Accused person.

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

Evelyne Nyauke – Court Assistant