



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: D. S. MAJANJA J.

CRIMINAL CASE NO.12 OF 2019

BETWEEN

REPUBLIC.....PROSECUTOR

AND

STANLEY SAITOTI KIPTIT.....ACCUSED

JUDGMENT

1. **STANLEY SAITOTI KIPTIT** (“the accused”) is charged with the offence of murder contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. It was alleged that on 13th March 2019 at 8.30pm at Nyangusu market, Olalchani Location of Transmara West Sub-county within Narok County, he murdered **ANTONY LESHAN** (“the deceased”).

2. The prosecution case was that on the material evening, the deceased was involved in an altercation at a bar in Kilgoris. While on his way home with his brother, he was waylaid by three people including the accused. The accused and his accomplice restrained the deceased’s brother while the third assailant hit the deceased on the head. The deceased collapsed and was rushed to hospital where he died. The prosecution marshalled 6 witnesses to prove its case while the accused gave a sworn statement in his own defence.

3. On the evening of 13th March 2019, Shadrack Naula (PW 1) and Amos Naula (PW 2) were drinking at Sweden Bar at Nyangusu market with the deceased who was their brother. At about 8.30pm, one *Murumbi* came into the bar and proceeded where the deceased was sitting. PW 1 recalled that he heard *Murumbi* tell the deceased that he had been looking for him. An altercation followed between the two. PW 2 intervened and separated them. PW 1 and PW 2 pushed *Murumbi* outside the bar. When they came back to the bar, PW 2 told PW 1 to take the deceased home.

4. PW 1 testified that he left the bar with deceased as his pillion passenger on his motorbike. As he was riding along the highway, he was stopped after about 5 minutes by two people whom he knew; the accused and *Balo*, the brother to *Murumbi* who had been at the bar earlier. Since they were his relatives and he knew them, he stopped. He further testified that the accused and *Balo* held him while *Murumbi* came from behind and hit the deceased on the head. When the deceased collapsed, the three assailants ran away. PW 1 immediately put the deceased on his motorbike and took the deceased first to Ogembo but was referred to Kilgoris. From Kilgoris, the deceased was transferred to Kisii Teaching and Referral Hospital (“KTRH”) where he died.

5. James Lemiso (PW 3) testified that at about 3.00am on 14th March 2019 he received a call that the deceased had been assaulted. As he was going to Kilgoris, he saw the ambulance taking the deceased to Kisii. When he visited the deceased at KTRH, he found him nursing head injuries. He told the court that the deceased died later that day.

6. Eunice Potisho Mundet (PW 4) testified that the deceased’s mother called her on 13th March 2019 to inform her that the deceased was at KTRH. She visited the hospital where she met the deceased’s mother and the deceased who had been admitted. She asked the mother whether the incident had been reported. As the incident had not been reported she sent someone to report it at the police station. She testified that she went to report the incident on 15th April 2019. In cross-examination, she stated that she was informed about what happened by PW 1.

7. The investigating officer, PC Stanley Korir (PW 5), recalled that PW 4 reported that the deceased had been assaulted by three assailants on 15th April 2019. He commenced investigations and took witness statements. He told the court that he recorded PW 1’s statement on 24th April 2019. He started looking for the suspects and on 15th March 2019, he was called by PW 3 who told him he had seen the accused. He proceeded to Kilgoris town where he arrested the accused. He told the court that the other assailants had disappeared from the locality.

8. The post mortem on the deceased's body was conducted by Dr Eric Ayara on 18th March 2019 at KTRH. The postmortem report was produced by Dr Leah Obosi Okoro (PW 6). According to the report, there was evidence of medical intervention on the body but most aspects of the body and organs were unremarkable. There was evidence of defensive wounds on the forearm. There was an old surgical scar on the right leg approximately 24cm long. On the head, there was extensive bleeding below the skin particularly on the parietal and occipital regions. The skull had a 14cm long fracture in the parietal region which was slightly displaced. Dr Ayara concluded that the cause of death was head injury due to blunt force trauma due to assault.

9. In his defence, the accused denied killing the deceased. He told the court that he was motorbike rider and on the evening of 13th March 2019, as he was going home from Nyangusu, he stopped a motorbike along the road at about 7.00pm. The motorbike rider, who he could not identify because he had a helmet, could not carry him as he had another customer. As he was talking to the rider, a vehicle came where they were and people in the vehicle who told him they had been looking for him but they left them and he proceeded home.

10. The offence of murder is defined by **section 203** of the **Penal Code** as follows, "*Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.*" The prosecution must prove beyond reasonable doubt the following three ingredients; the death of the deceased and the cause of that death; that the accused committed the unlawful act that led to the death; and that the accused committed the unlawful act with malice aforethought.

11. PW 1 testified that the deceased was hit on the head while PW 2, PW 3 and PW 4 confirmed that when they visited the hospital, the deceased had head injuries. This evidence is consistent with findings of the postmortem which showed that the deceased died and that he died as a result blunt force trauma inflicted on his head.

12. The main issue for determination is whether the accused was one of the assailants who waylaid the deceased and PW 1 and acted with the common intention to inflict the blow that caused his death. The prosecution case is grounded on the direct evidence of a single witness in circumstances that are difficult for positive identification as the incident took place at night. The guiding principles to be applied by courts when considering such evidence are summed up in the well-known case of **Abdallah Bin Wendoh & Another v Regina [1953] EACA 166** where the Court held:

Although subject to certain exceptions a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of such witness respecting the identification especially when it is known that the conditions favouring a correct identification are difficult. In such circumstances other evidence circumstantial or direct pointing to guilt is needed.

13. When considering such evidence of identification, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him (see **R v Turnbull [1967] 3 ALL ER 549** and **Maitanyi v Republic [1986] KLR 194**). This requirement is, however, relaxed when dealing with the case of recognition because, "*recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.*" (see **Anjononi & Others v Republic [1980] KLR 59**). However, even in such cases, the court must bear in mind that even where parties had prior or close relationship, mistakes can still be made in identification hence the court must still exercise a level of caution.

14. This case was not one of identification of a stranger but of recognition of a person well known to PW 1. PW 1 testified that he knew the accused as a friend and as a fellow bodaboda rider. Likewise, PW 2 knew him as bodaboda rider while PW 3 told the court that he was a neighbour. Although the accused denied that he knew PW 1, the evidence shows that the accused came from the locality, was a bodaboda rider hence it was unlikely that he was not known to PW 1 or the deceased.

15. PW 1 testified that since he knew the accused and **Balo**, he stopped as he thought they had a problem. He told the court that he also recognised them as his motorbike lights were on when he stopped. Coupled with the very close encounter when the accused held him as **Murumbi** hit the deceased, I am satisfied the conditions were favourable for positive identification and as such his recognition of the accused was free from error. Although the accused denied that was among the assailants, his defence placed him within Nyangusu market on the said evening.

16. It was suggested that the fact that PW 1 recorded his statement a month after the incident weakened the prosecution case and undermined his credibility. PW 5 told the court that PW 1 told him he was unavailable to record the statement while nothing was suggested to PW 1 in cross-examination that he had a reason to lie or that he had a grudge with the accused. That notwithstanding, PW 4 who reported the incident told the court that she was informed of the assault and assailants by PW 1 and it is from that report that the investigations commenced.

17. Since evidence shows that it is a third person who inflicted the blow that led to the deceased's death, the prosecution had to establish that the accused together with the two assailants acted with a common intention to cause the death of the deceased. **Section 21** of the **Penal Code** deals with the doctrine of common intention and it states as follows:

21. 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.

18. In **Eunice Musenya Ndui v Republic CA NRB Criminal Appeal No. 534 of 2010 [2011] eKLR**, the Court of Appeal identified five elements of common intention, namely: that there must be two or more persons; who must form a common intention; the common intention must be towards prosecuting an unlawful purpose in conjunction with one another; to which an offence must be committed in the process; and the offence must be of such a nature that its commission was a probable consequence of the prosecution of such purpose. In **Rex v Taburayinka s/o Kirya [1943] EACA** the court held that, "*The common intention may be inferred from their presence, their actions and the omission of either of them to disassociate himself with the assault.*"

19. The testimony of PW 1 was that he and the deceased were waylaid by the accused and *Balo* who held him while *Murumbi* assaulted the deceased. The act of restraining PW 1, who was the only other person with the deceased, was intended to prevent PW 1 from the assisting or rescuing the deceased while he was being assaulted. This evidence also established that the incident was planned as two assailants waylaid the PW 1 and the deceased and restrained PW 1 while the assault on the deceased was effected. The common intention is further buttressed by the fact that *Murumbi* had confronted the accused earlier at the bar. The accused did not dissociate himself with the act of assault as the assailants all left together after *Murumbi* had committed the felonious act. I therefore find and hold that the prosecution established that the accused had common intention to assault the deceased and that he did act with common intention to cause the unlawful act that led to the deceased's death.

20. I now turn to the final element of the offence of murder; malice aforethought. Malice aforethought constitutes the mental element of the offence of murder, that is, *mens rea* or the *intention* to kill another person. **Section 206** of the **Penal Code** defines it 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.*

21. Malice aforethought may be express, implied or constructive. It is express if there is a clear intention to cause *death* while it is implied if the accused had an intention to cause *grievous bodily harm* or if it is shown that the accused knew that there was a *serious risk* that death or grievous bodily harm could result from his conduct but he proceeds to do so without any lawful excuse. Where the homicide is committed in furtherance of a felony or when resisting or preventing lawful arrest, notwithstanding the absence of an intention to kill or to cause grievous bodily harm, the accused is deemed to have constructive malice aforethought (see generally **Raphael Mbuvi Kimasi v Republic** NYR CA Criminal Appeal No. 61 of 2013 [2014] eKLR, **Nzuki v Republic** [1993]KLR 171).

22. The evidence shows that the accused was part of a premeditated plan to waylay the deceased and assault him. Although the accused was not at Sweden Bar when *Murumbi* came to confront the deceased, it is clear he enlisted *Balo* and the accused in his plan. The accused played his part in restraining the PW 1 so that *Murumbi* could assault the deceased. What is lacking is whether the plan between the accused and his accomplices was to cause grievous harm or kill the deceased. It is also difficult to say whether the accused knew of the assailant's intention to inflict fatal blow thus I find that although the accused engaged in an unlawful act that led to the death of the deceased such death may not have been intended or anticipated by the accused.

23. From the evidence I have outlined, I find that the prosecution failed to prove malice aforethought. The prosecution proved that the accused, **STANLEY SAITOTI KIPTIT** participated in causing the unlawful act that led to the death of **ANTHONY LESHAN**. He is therefore guilty of the offence of manslaughter contrary to **section 202** of the **Penal Code** and I convict him accordingly.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED and DELIVERED at KISII this 10th day of JUNE 2019.

R. E. OUGO

JUDGE

Mr Kaba, Advocate for the accused.

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