



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL CASE NO. 2 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

JACKSON OLE KILERAL.....ACCUSED

JUDGEMENT

Introduction

1. The accused is charged with murder contrary to section 203 as read with section 204 of the Penal Code (Cap 63) Laws of Kenya, in respect of the deceased, More ole Kerempe. He pleaded not guilty. The prosecution called six witnesses in support of the charge.
2. In his deference the accused made an unsworn statement and called no witnesses.

The case for the prosecution

3. The prosecution called Caroline Kwamboka Nyambaka (Pw 2). Pw 2 was the owner and bar attendant at "Two in One" bar at Ewaso Ngiro. She testified that both the deceased and the accused were her customers during the night of 3rd February 2018. It was her evidence that her bar was well light with electricity light, both within and outside the bar. At 10.30 the deceased went to her bar and requested her for Shs. 10 to add to his shs 20 to enable him to buy keg beer for Shs 30. She refused to sell him the beer; since it was past time for selling beer. The deceased then started to complain.
4. At that time the accused, who was a regular customer of Pw 2 came into the bar. After entering the bar, the two started to quarrel in Kimaasai, which Pw 2 did not understand. As a result, the accused got hold of the neck of the deceased. Pw 2 then got out of the counter and requested the accused to let go the deceased. The accused then left the deceased. Furthermore, Pw 2 requested the accused not to beat the deceased. Pw 2 continued to testify that they continued to quarrel after the accused had released the deceased. Pw 2 ordered them out of the bar, since it was time to close the bar.
5. As a result, the accused went out first and the deceased followed him. He heard people quarrelling and as a result she went out. Pw 2 then saw the accused hitting the deceased three times with a metal studded Maasai rungu (exhibit 1). It is the second hitting of the accused that forced the deceased to fall down on the ground. Pw 2 returned to the bar and told Leitato Kerempe that the accused was beating the deceased. The two then went out and found the deceased bleeding from the head injury. Leitato is a nephew to the deceased.
6. The following day on 4th February 2018 a villager elder called George came and asked Pw 2 as to whether people fought in her bar. She replied him that she could recognize the accused by appearance, since she knew him by appearance. The brothers of the deceased collected the deceased and took him to Narok referral hospital. The same brothers left her with their telephone numbers to contact them upon seeing the accused.
7. After one week on 17th February 2018 the accused went to the bar of Pw 2. Pw 2 then rang Kasino Kerempe (Pw 3) as agreed, who then went and arrested the accused together with the chief and many other people. They then tied the accused with a rope and took him to Narok police station.
8. The deceased died at Tenwek hospital while undergoing treatment. It was the evidence of Pw 3 that the deceased had been transferred to Tenwek hospital, since he had sustained a serious injury. It is in Tenwek hospital that Pw 3 identified the body of the deceased to the doctor, who performed a postmortem examination on the body of the deceased.
9. Furthermore, the prosecution called the investigating officer, No 69000 P. C Slyphanus Ndolo (PW 6) of CID Malindi, who was previously attached to CID Ololulunga in Narok county. It was the evidence of Pw 6 that the death of the deceased had been reported by Kasino Ole Kerempe (Pw 3) and one Murage Dikirr. They had reported that the accused had assaulted the deceased. They also told him that

the body of the deceased was found in a bush by one Nakise Tikani. The body of the deceased was discovered in the bush the following day by Tikise Ole Tikini (PW 5). Pw 6 also testified that Pw 2 told him that it was the accused who picked up a quarrel with the deceased in the bar of Pw 2. Pw 2 intervened when the accused was strangling the deceased. Both the deceased and accused left the bar. She then heard the deceased crying after being hit with a rungu. Thereafter the accused disappeared.

10. The prosecution also called Felix Leitato Kerempe (Pw 1). It was the evidence of Pw 1 that he bought beer for the deceased. While there Pw 1 saw the deceased exchange a quarrel with old men who were in that bar at Ewaso Ngiro. Thereafter the deceased left the bar. Pw 1 then heard the bar owner scream from outside the bar. Pw 1 called the bar owner that the deceased was being beaten. Pw 1 went out and found the deceased had been beaten and was lying down. Pw 1 then asked the bar owner as to who had beaten the deceased. The bar owner responded by telling Pw 1 that the person who beat the deceased was one of her customers; who used to go to her bar.

11. The report of the postmortem in respect of the deceased was put in evidence as exhibit 1. According to exhibit 1 the deceased was aged 58 years old. The doctor found the following injuries on the body of the deceased. There were bruises on both buttocks. There was a depressed skull fracture at the back of the head. There was an open fracture on the right parietal region. The cause of death was due to blunt trauma to the head.

The case for the defence

12. Upon being put on his defence, the accused elected to make an unsworn statement. He stated that he is 36 years old from Ewaso Nyiro ward in Narok south. He further stated that on 1st February 2018 he went on a journey to Olkinyiei ward to the family of Letlal Ole Sena in Narok West, where he spent three nights. He left that home on 5th February 2018 at 11.00 am. He denied having any idea about this charge. It was his evidence that he does not know whoever claimed that he was responsible for the murder of the deceased. He also claimed that that person does not know him.

Submissions of counsel for the accused.

13. Counsel for the accused submitted that the prosecution had failed to prove their case beyond reasonable doubt against the accused. Counsel therefore urged the court to acquit the accused. According to counsel, the prosecution in a charge of murder must prove three elements, which are as follows. 1. That the death of the deceased had occurred 2. That the accused committed the unlawful act, which caused the death of the deceased; and 3. That the accused had malice aforethought. He cited the case of *Anthony Ndegwa Ngari v Republic (2014) eKLR* in support of his submission. He also cited the case of *Nzuki v Republic (1993) KLR 171*, in which the Court of Appeal defined malice aforethought. According to that court malice aforethought is established if the following elements are proved. First, an intention to cause death. Or second, an intention to cause grievous harm. Or third, where the accused knows that there is a risk that death or grievous bodily harm will ensue from his acts and commits them without lawful excuse.

14. Finally, counsel submitted that the evidence of the bar owner (Pw 2), who was also the attendant requires corroboration in terms of section 124 of the Evidence Act (Cap 80) Laws of Kenya. It was the evidence of Pw 2 that she saw the accused striking the deceased three times with a Maasai metal studded rungu.

The submissions of the prosecution

15. The prosecution having been conducted by a senior prosecution counsel did not have a right of reply and therefore did not file written submissions in terms of sections 310 as read with section 161 of the Criminal Procedure Code (Cap 75) Laws of Kenya.

Issues for Determination.

16. I have considered the entire prosecution and defence evidence 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 accused had malice aforethought. 3. Whether or not the offence disclosed is murder or manslaughter. 4. Whether or the prosecution has proved its case beyond reasonable doubt

Issue 1

17. I find from the prosecution evidence of Caroline Kwamboka Nyambaka (Pw 2), that it is the accused who fatally struck the deceased in the head three times with a Maasai metal studded rungu. Although the circumstances favouring identification were difficult; Pw 2 was able to positively recognize the accused during that fateful night. The following circumstances favoured the positive recognition of the accused. First, Pw 2 had known the accused for two years before this incident. Second, there was electricity light at the scene of crime, both within and outside the bar. Third, Pw 2 had enough opportunity to observe the accused as he quarreled with the deceased outside the bar; in the course of which she requested the accused not to beat the deceased. Fourth, Pw 2 was in close proximity to both the accused and the deceased.

18. I do not believe the alibi defence of the accused. I also do not believe him that Pw 2 did not know him. Pw 2 had no reason to give false evidence against him. Furthermore, the accused did not put to Pw 2 that she did not know him. I find as a fact that the alibi defence of the accused has been disproved.

19. In the circumstances I find that it was the accused who inflicted the three fatal strikes in the head of the deceased. He is therefore the person who caused the death of the deceased.

Issue 2

20. It is the accused who struck the deceased in the head three times with a Maasai metal studded rungu. I find that the accused intended to cause grievous harm to the deceased. I therefore find that the accused was possessed of malice aforethought in terms of section 206 of the Penal Code (Cap 63) Laws of Kenya.

Issue 3

21. In the light of the finding that the accused was possessed of malice aforethought as required by law, I find that the offence disclosed is one of murder contrary to section 203 as read with 204 of the Penal Code.

Issue 4

22. After considering the entire evidence in the light of the applicable law, I find that the prosecution has proved its case beyond reasonable doubt against the accused.

23. The upshot of the foregoing is that I find the accused guilty of murder and pursuant to section 322 of the Criminal Procedure Code (Cap 75) Laws of Kenya I hereby convict him of murder contrary to section 203 as read with section 204 of the Penal Code.

Judgement dated, signed and delivered at Narok this 4th day of June 2019 in the presence of Mr. Omwega for the state and Mr. Langat for the accused

J. M. Bwonwonga

Judge

4/6/2019