



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL CASE NO. 12 OF 2016

REPUBLIC.....THE PROSECUTOR

=VRS

KELVIN OGATO GEKONGE.....THE ACCUSED

JUDGEMENT

The accused is charged with the Murder of Samuel Magama Nyanumba at Mobamba village in Nyamira County, on the night of 26th July 2016, contrary to Section 203 as read with Section 204 of the Penal Code.

Briefly the prosecution's case was that on the material day the accused went for dinner at his grandfather's house, the deceased in this case, and after eating what was offered by his grandmother (Pw2) he left. It was then that his grandmother (Pw2) noticed that he had taken a phone which she had put on a table. The deceased followed him to his house about 800 metres from theirs to get it back but that was not to be because he did not return to his house. At about 11pm that night Mokaya Omaiyo (Pw3) their area Chief received a call from Keroka Police Station but the line was not clear making communication with the caller impossible. At about 4am he called a Mr. Toya of Keroka Police Station who informed him that they were holding a young man from his area who had reported to them that he had killed many people and one Magama could attest to it. The said Mr. Toya requested him to go to Magama's place to find out if it was true and so he went and found Magama's wife (Pw2). He inquired if Magama was there but she told him Magama had left the house with the accused the previous night and did not return. Pw3 called Toya who again asked him to go to the accused's house as the young man had told him he had locked up Magama there.

The Assistant Chief (Pw3) proceeded to the house of the accused in the company of Magama's wife (Pw2) and other family members. They peeped inside and saw someone lying on the floor. The door was secured with a padlock so they broke it and entered. They found Magama lying in a pool of blood on the floor. He was covered with a blanket and he had an injury on the head. Pw3 called Toya and informed him what he had seen. It was then that a team of police officers went to the scene. The police officers removed the body to Gucha Mortuary in Keroka and also carried a panga which was in the house and which they suspected to be the murder weapon. Peter Malimali (Pw5) a Police Constable then based at Keroka Police Station confirmed that the accused person surrendered to the station and reported that he had killed someone. He stated that the accused's shirt was stained with blood and that they took it to the government analyst for forensic examination together with the blood stained panga collected at the scene and a blood sample of the deceased collected during the post mortem. According to the report of the analyst produced at the trial by the investigating officer the DNA profiles that were generated from the panga and the shirt matched that of the deceased in this case. The investigating officer stated that upon reading the report of the government analyst he came to the conclusion that the accused killed the deceased and charged him with this offence.

Dr. Charles Ogachi (Pw1), the Medical Officer in charge of Keroka District Hospital testified on behalf of Dr. Matingai who could not be called without causing undue delay. He testified that Dr. Matingai conducted a post mortem on the body of the deceased on 2nd August 2016 and came to the conclusion that the cause of death was cardio-pulmonary arrest secondary to severe injury to the cervical spinal code secondary to a penetrating injury. He confirmed that a blood sample was taken from the body and handed over to PC Peter Malimali for DNA analysis.

The accused gave sworn evidence. He testified that he was a representative of Boda Boda operators in Kericho where he lived and had come home on 23rd July 2016 in order to apply for a national identity card so he could get work. He stated that he arrived in Keroka at 9am and went to "headquarters" to check if his ID was ready but was told to go back the next day. However even by 24th July 2016 the ID was not ready and he was instructed to go and wait at the Chief's office. He stated that on 26th while he was sleeping some people attacked him and cut him on the left armpit and on the right hand and so he decided to defend himself. He stated that he pushed one of the attackers and ran out shouting. He reported the matter to the chief who advised him to report to the police. He stated that when he went to the police station to report he was pushed into the cell by five people. The next day the OCS told him that he had received a report that someone had died in his house. Since he knew the people who had come to make the report he went and apologised to them as he had not intended such a thing to happen in his house. He contended that he had no knowledge of who died and that he paid Kshs. 50,000/= to finish the issue. He further contended that prior to that incident he had disputed with the deceased but he had paid for the trees the subject of the dispute. He stated that the deceased was not happy that he, the accused, had bought trees from his son and had threatened him with dire consequences. He denied that on the material day he assaulted or fought somebody. He stated that he escaped and fled to the police station. He asked to be forgiven as

he had not intended to do what he did and further stated that it was only while at the station that he learnt somebody had died in his house. He contended that he acted in self-defence and that he contributed money for the deceased's funeral and burial. Finally, he stated that he pushed the deceased as he was running away only to learn later that he had died.

In cross examination he denied that the deceased and his widow (Pw2) were his grandparents and contended that he only knew the deceased because sometimes in the year 2015 he had bought some trees from the deceased's son and the deceased had threatened him. He explained that he was not very familiar with the deceased as he rarely went home and further contended that the reason he sought forgiveness from the family of the deceased was because the OCS (Officer Commanding Station) had told him that would bring the matter to an end. He also stated that he first threw a blanket at the deceased then pushed him.

The **offence of murder is established when it is proved beyond reasonable doubt that the accused of malice aforethought caused the death of the deceased by an unlawful act or omission.** Section 206 of the **Penal Code** states that malice aforethought is deemed as established by evidence proving 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.”

The issues for determination in this case are firstly, **whether the prosecution has proved beyond reasonable doubt that the accused killed the deceased by an unlawful act** and secondly, if he did **whether the prosecution has established any one or more of the circumstances set out in Section 206 of the Penal Code.**

Section 169 (1) of the Criminal Procedure Code requires that after setting out the point or points for determination, the court shall state the decision thereon and thereafter the reasons for that decision.

In this case, I am satisfied that the prosecution has proved all the elements of the offence of murder beyond reasonable doubt. It was proved beyond reasonable doubt that the body of the deceased was found on the floor of the accused's house. The body was covered with a blanket and there is evidence that it had several cuts on the head, neck, on the spinal cord and spinal column. Indeed, it was established that his death was directly as a result of severe injury to his cervical spinal cord due to penetrating injury. The injuries were so severe as to establish that whoever inflicted those injuries had an intention to either kill or to cause the deceased grievous harm or at the very least had knowledge that the injuries could cause death or do the deceased grievous harm. I am further satisfied that the accused's own testimony that he was at his house on the material day and that an incident occurred in his house, placed him at the scene of the murder. I am not convinced that he was the victim of the attack and that he acted in self-defence. To the contrary, it is my finding that he was the attacker. His defence was not credible. There were so many inconsistencies in his testimony that render it unreliable and untrustworthy. Whereas he alleges to have acted in self-defence by pushing one of the attackers and not knowing who it was he had pushed, in the end he admitted that the person he pushed was the deceased. His testimony that he ran for his dear life after shoving the attacker could not be true for the following reasons: -

i. The fact that the door was secured with a padlock is inconsistent with the conduct of a person who was fleeing to save his life.

ii. The body of the deceased was covered with a blanket which again is inconsistent with the conduct of a person who had been attacked and was trying to flee his attackers.

iii. The deceased had multiple severe injuries which are inconsistent with a push.

iv. A blood stained panga which was proved through evidence to have been used to commit the offence was found in the house and this proves the deceased was not merely “pushed”.

v. The shirt which the accused was wearing when he surrendered to Keroka Police Station had blood which matched that on the panga and the sample taken from the deceased.

Further, in his testimony the accused denied that he knew the deceased only to admit he knew him in re-examination. He also denied surrendering to the police and stated that it was the Chief who advised him to go there yet in his own words he stated: -

“I was attacked in my house. I escaped and fled to the police station.”

This was grossly at variance with his earlier statement that he reported the matter to the Assistant Chief who advised him to go to the police station only for him to go there and be locked up. His evidence that he was in his house on the night this offence was committed and that he threw a blanket on the **“attacker”** not only places him at the scene of murder but also confirms that the prosecution witnesses were truthful and that their evidence was credible, trustworthy and reliable. His admission that he went to the police station that night confirms the

testimony of PC Malimali (Pw5) as well as that of the Assistant Chief (Pw3) that he received a communication concerning the incident from the police that morning. It is my finding that the accused killed the deceased when the deceased who was his grandfather followed him to his house to recover his wife's (the accused's grandmother) phone which he had carried on his way home after having dinner in their house. It is my finding that he did so of malice aforethought. There is nothing in the evidence to suggest that the deceased attacked the accused and moreover from the nature of the injuries inflicted upon the deceased, there was more than reasonable force used and self-defence would not avail to the accused.

In the upshot I find him guilty of murder contrary to Section 203 as read with Section 204 of the Penal Code and convict him accordingly.

Signed, dated and delivered in Nyamira this 17th day of October 2019.

E. N. MAINA

JUDGE