



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT LODWAR

HIGH COURT CRIMINAL CASE NO. 6 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

RUAN REATH.....ACCUSED

JUDGEMENT

1. The accused was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**, the particulars of which were that on the 12th day of June 2017, at Kakamu in Turkana West Sub-county within Turkana County murdered **GATKHOR NHIAL RIEK**.

2. He pleaded not guilty to the said charges and the trial commenced before Riech J. on 20/02/2017 who took the evidence of **PW1** and **PW2** before proceeding on transfer. On 2/10/2018 the cause was placed before me and in compliance with **Section 200** of the **Criminal Procedure Code** directions were given that the matter proceeds from where it had reached.

PROSECUTION CASE

3. The prosecution case was that the deceased's friend one **PAL DENG CHUOL** was involved in a romantic relationship with the younger sister of the accused. She testified as **PW3** and her evidence was that she together with the accused and the deceased were refugees staying at Kakuma Camp. As a result of the relationship with **PAL DENG CHUOL** she got pregnant which did not go down well with her brothers including the accused, as she was a student in class seven (7). On 12/06/2017 she visited her boyfriend who she found with three (3) other people including the deceased. At 2.00 a.m. her brother went to where they were armed with *rungus* and attacked the deceased who was later taken to the clinic. In cross-examination she stated that she ran out of the room with the accused hitting her. She was later put under child protection.

4. **PW2 JIMA GAI MACHAR** a block leader testified that he was called at 2.00 a.m. and told that the deceased had been beaten by a group of people and had been taken to the hospital. He proceeded to the hospital where he found the deceased on drip. He was then informed that he had died. He went to the scene with the police where they were told that the deceased had been beaten by a group of people. He testified that **PW3** told him that her brother wanted to look for the person who impregnated her and gave the names of her brothers as **TARIR NYANG, REATH RUAN, GATIANI** and **MALON**. He did not witness the incidence.

5. **PW5 INSP. JOHNSON MUTUA** received the report on the death of the deceased and the arrest of two people – **TARIR NYANG** and **RUAN REATH** the accused, on allegation that they had attacked the deceased who had impregnated their sister. He then recorded statements from the prosecution witnesses. **Tarir Nyang** was released as an eye witnesses while the accused was charged. He attended post-mortem examination conducted by **Dr. Owuor** on 13/06/2017. In cross-examination he stated that the accused was arrested by the OCS and that there were no photographs taken at the scene. It was his evidence that a group of Sudanese people had gone to punish the person who had impregnated the accused's sister who should have been **PAL DENG CHUOL** but got the wrong person, the deceased. It was his evidence that the deceased was not armed at the time he was attacked.

DEFENCE CASE

6. When put on his defence the accused gave sworn statement and stated that on the material day when he came back to the house, he was informed that his sister had been sent to the market but had not returned. He inquired from her friend with whom they had been sent but was told that they had not intended to go to the market but to Kakuma Two because **PW3** was pregnant and they were going to her husband or boyfriend with whom they were planning to get out of the country to avoid legal implications. Since **PW3** was only sixteen (16) years old and a student in class seven he became worried. Together with his brothers they decided to go get their sister and found her in a house and a fight broke out with the group holding her sister attempting to chase them away while they wanted to take her away from the group. It was his evidence that in the process one of his brothers was injured while the deceased who was in the other group was also injured.

7. They then took **PW3** away and left her with the clan elder who later on informed him that the deceased had been injured in the fight. The

elder called his brother **Tarir Nyang** whom he took to the police station together with **PW3** and were arrested. The next day he went to the police station to check on them and was also arrested. It was his evidence that the police later told him that **Tari** had implicated him as the main suspect upon which he was released. He stated that he did not have any grudge with the deceased. In cross-examination he stated that they were not armed with any weapon and only fought with the fist. He stated that **PW3** was inside the house while the fight was outside the house and therefore did not witness what happened. It was his evidence that he also sustained injuries during the fight.

SUBMISSIONS

8. On behalf of the prosecution it was submitted that the accused was identified by **PW3** his sister whose evidence was that he was armed with a metal bar. It was submitted that the deceased was not armed and therefore the defence of self-defence was not available to the accused. It was submitted that the accused did not call in any evidence to prove that he was exercising self-defence. In support of the said submissions the case of **REPUBLIC v HENRY OBISA AUKO [2018] eKLR** was submitted.

9. On behalf of the accused it was submitted that **PW3** did not see the accused beating the deceased using metal rod as she had ran away from the scene. Other than the accused there were other persons who equally had the opportunity to kill the deceased, who were not exonerated and therefore the evidence against the accused only raises grave suspicion against him from which the case of **NEEMA MWANDORO NDURYA v REPUBLIC [2008] eKLR** to the effect that suspicion however strong cannot provide a basis for inferring guilt, was relied upon. It was submitted that vital witnesses including **Tarin Nyang** who had been arrested and released from custody and **Pal Deng** the boyfriend of **PW3** were not called as witnesses and therefore adverse inference should be made against them. It was finally submitted that malice aforethought was not proved.

ANALYSIS AND DETERMINATION

10. For the prosecution to sustain a conviction on a charge of murder, it is under both legal and evidential obligation to prove the following ingredients of the offence:-

a) The fact and cause of death.

b) That the said death was caused by unlawful act on the part of the accused.

c) That it was caused with malice aforethought.

11. The fact and cause of death of the deceased was proved through the evidence of the following prosecution witnesses:- **PW1 DR. NUUR HUSSEIN** – who produced post-mortem report conducted by **DR. OWUOR, PW2** who visited the deceased at the hospital and saw his status before being told later on that he had died, **PW5 INSP. JOHNSON MUTUA** who attended the post-mortem examination and **PW4 DR. JOHN WAIGANYO THIONGO** who confirmed the cause of death as brain injury due to blunt force trauma.

12. On whether the said death was caused by the accused:- Whereas it has been submitted by the accused that there was no direct evidence linking him to the death of the deceased, he conceded in his defence that he together with his brothers went looking for **PW3** their younger sister whom they found in the house where the deceased and his group were and that a fight broke out thereafter. This evidence corroborates that of **PW3**. Though there is no direct evidence that the accused inflicted the blow which led to the death of the deceased, having been together with his brothers when the fight ensued from which the deceased sustained injuries that directly led to his death, the accused is in law therefore presumed to had the common intention with his brothers as is defined under **Section 20 and 21 of the Penal Code** as was applied in **DICKSON MWANGI MUNENE & ANOTHER v REPUBLIC, CRIMINAL APPEAL NO. 314 Of 2011 (2014) eKLR**. The accused was not an innocent bystander as he conceded that he took part in the fight and was indeed injured in the process. I therefore find that the death of the deceased was caused by the accused.

13. On whether the said act was caused with malice aforethought:- The evidence before the court shows that the accused and his group did not have the intention to cause the death of the deceased. According to **PW5 INSP. MUTUA** who investigated the matter, the intent was to punish the deceased' friend who had impregnated their sister **PW3**. According to the accused, their intention was to rescue **PW3** whom they had information was about to leave the country with her boyfriend. There is no evidence tendered by the prosecution to dispute the accused's account of the occurrence at that night. I therefore find and hold that prosecution failed to prove malice aforethought on the part of the accused person.

14. The accused in his defence raised the issue of self defence, that together with his brothers they went to rescue their sister **PW3** who was held by the deceased and his group. It was the accused's evidence that it was at night when they got to the house where **PW3** was. There were many people in the house where she was, which she confirmed in her evidence in chief and I therefore find that the force used by the accused's group to wade off the attack was not unreasonable. Whereas the accused did not raise it, I am of the considered view that the defence of provocation was also available to him. **PW3** was only sixteen (16) years when she was made pregnant. She was in the custody of the accused both being refugees in Kenya and the act of her boyfriend attempting to sneak her out of the country amounted to provocation of the accused for which he is entitled to the defence under **Section 207 and 208 (1) & (2) of the Penal Code** as confirmed through the evidence of **PW5** the Investigating Officer.

15. Having failed to prove malice aforethought on the part of the accused person whom I find to had established the two defences of self defence and provocation, it is my finding that the prosecution has failed to prove the ingredients of malice against the accused person whom I hereby find not guilty and accordingly acquit of the charge of murder. The accused shall be set free forthwith unless otherwise lawfully held.

16. The State has a right of appeal and it is so ordered.

Dated, delivered and signed at Lodwar this 1st day of October, 2019.

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J. WAKIAGA

JUDGE

In the presence of:-

_____ *for the State*

_____ *for the Accused*

Accused _____

_____ *- Court assistant*