



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO. 81 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

JUMA NYAYO APERI Alias MUSTAFA.....ACCUSED

JUDGMENT

The accused, Juma Nyayo Aperi alias Mustafa, is charged with the murder of Edward Onsongo, the deceased, contrary to section 203 as read with section 204 of the Penal Code. The particulars of this offence show that it was committed on 22nd August 2014 at Kingstone Slums within Industrial Area in Nairobi County. The accused has denied committing this offence. To support its case against the accused, the prosecution called a total of ten (10) witnesses. The accused testified as the only witness for the defense.

The deceased died as a result of head injury due to blunt force trauma with a stab to the jaw. Dr. Dorothy Njeru (PW4) testified that when she examined the body of the deceased on 28th August 2014 after it was identified to her by Richard Nyakundi a cousin to the deceased and Bernard Musa Nyakundi an uncle to the deceased, she found the following injuries:

- (i) Abrasions on the left side of the head with obvious skull fractures.**
- (ii) Contusions of soft tissues on the outer aspect of both hands.**
- (iii) Fractures of the mandible and the maxilla.**
- (iv) Stab wound on the left side of the jaw measuring 3cm long.**
- (v) Extensive bleeding into the substance of the skin covering the head.**
- (vi) Multiple fractures of the skull.**
- (vii) Bleeding in the substance of the brain.**

From the evidence on record, the accused and the deceased were friends. On 22nd August 2014 Felix Murori (PW6) and Jeremiah Ombati (PW3) both residents of Kingstone Slums who lived near the scene where this offence was committed, were sleeping in their respective houses when at 3.00am some noise disturbed their sleep. They woke up and went outside. Felix testified that he went to the scene and found two friends, known to him before this date, fighting. At first he thought they were fighting but he noticed that it was the accused that was beating the deceased using a wooden club commonly referred to as a "rungu". The accused was claiming that the deceased had taken thieves to accused's place to steal from him. According to Felix, the accused was also holding a knife in one hand. He testified that although many people gathered at the scene no one did anything to help the deceased because the accused was threatening them with the knife and the club. He said that the deceased was lying on the ground calling for help.

On his part, Jeremiah Ombati told the court that when he went out of his house to the scene he found someone being beaten on allegations of having organized thieves to steal from the accused. Ombati told the court that the accused was beating the other man and that he knew the accused but not the other man being beaten. Ombati told the court that the victim was pleading with the accused telling him that it was not true that he had organized the theft. Ombati said that the victim did not fight back and that no one helped him and that the victim died at the scene. The relatives of the victim, including Esther Kemunto (PW2) and one Musa, were informed about the assault. By the time they arrived at the scene the deceased was already dead. Witnesses including Ombati, Esther Kemunto, and Rogers Mogire (PW1) told the court that they saw a knife (Ex. 6) and a big stone which they described as a building block at the scene stained with blood.

The matter was reported at the Lunga Lunga AP post and Industrial Area Police Station. At the time Ombati and Felix arrived at the scene the accused was not at the scene. By the time police arrived at the scene, the accused had been arrested by members of the public and taken back to the scene. He was rescued by the police from the members of public who were beating him. He was taken to Industrial Area Police Stations where he was charged with this offence. The body of the deceased was removed from the scene and taken to the City Mortuary where it was examined on 29th August 2014.

In his defense, the accused told the court that thieves attacked his pub on 22nd August 2014 at about 1.30am and took away alcohol, DVD and phones and left after locking the accused and customers inside the pub. He testified that he called a neighbour who opened for them. He stated that one person, the deceased, was captured by Maasai watchmen who were guarding the area and beaten. He stated that by the time they went outside they found the deceased dead; that he decided to go to report to the police at Reuben Police Post about 3.30am and that in the company of the police they returned to the scene. He testified that at about 7.00am one person known as Fundi held him and claimed that he (accused) had attacked the deceased and that Fundi cut him on the ear while Kemunto hit him on the head. He stated that he was taken to a nearby clinic by the police from Industrial Area Police Station. In cross examination the accused denied that the deceased was his friend and that he had known him before. He reiterated that the deceased was assaulted when he (accused) and customers were locked inside the pub. He said there was light inside the pub but not outside.

Mrs. Gulenywa prepared written submissions in which she urges that the prosecution witnesses were not at the scene and only arrived after the deceased had died and therefore their evidence cannot be relied on to convict the accused. She submitted that the evidence on record does not point to the accused as the person who killed the deceased and that the scene of crime is a slum area with poor lighting. She submitted that the evidence on record is marred with contradictions with some witnesses saying the area was well lit while others were saying that the place was dark; that there is no clear evidence on identification of the accused; that the weapon used was not recovered and that the items found at the scene were only placed there leading to contradictions in evidence as to whether a huge stone or a 'rungu' was used and that investigations were poorly done. Mrs. Gulenywa cited R. v. Edward Kamau Mburu and Others [2016] eKLR and R. v. Peter Wainaina Nduta [2017] eKLR to support the defense case. I have acquainted myself with the above cited authorities. The first case, R. v. Edward Mburu and another, deals with circumstantial evidence while the Peter Wainaina case deals with the issue of identification.

The offence of murder is committed when **any person who of malice aforethought causes the death of another person by an unlawful act or omission**. The law places the onus of proving a criminal charge like this one on the prosecution. The prosecution must prove beyond reasonable doubt that:

- (i) The deceased, Edward Onsongo, is dead.**
- (ii) The accused before the court killed him.**
- (iii) The unlawful act or omission by the accused causing the death of the deceased.**
- (iv) Malice aforethought on the part of the accused in causing the death of the deceased.**

All the witnesses who went to the scene testified that the deceased died at the scene. The accused too attests to this fact that the deceased died at the scene although according to him, the deceased was killed by some Maasai watchmen. The evidence on record shows that the police removed the body of the deceased from the scene and took it to the City Mortuary on 22nd August 2014. PC Moses Maina Muraguri (PW8) was instructed to take photographs of the scene of the crime and he confirmed to the court that he went to the scene and took five (5) photographs showing the body of the deceased in different views. Dr. Dorothy Njeru examined the body of the deceased on 28th August 2014 and formed the opinion that the deceased died due to head injury caused by a blunt object and a stab at his jaw.

I am satisfied by the evidence on record that the deceased died and I make a finding that the prosecution has proved beyond reasonable doubt that the death of the deceased occurred. The death of the deceased is unlawful. He had suffered multiple injuries: abrasions on his head; contusions on both hands; fractured skull; fractured mandible and maxilla; stab wound on left side of the jaw and extensive bleeding in the skin covering the head and in the substance of the brain. By the very nature of these injuries it is clear to me that the death of the deceased was unlawful.

In regard to the issue whether the accused caused the death of the deceased, I have considered the submissions by the defense and the evidence on record. From the outset I disagree with the defense counsel that the evidence against the accused is circumstantial. It is not. There are two people, Felix and Jeremiah, who told the court that they witnessed the assault. I now turn to their evidence. Jeremiah told the court as follows:

“At night around 3.00am some noise woke me up (sic). I live near the road. It was something like a conflict. I went out and found someone being beaten on allegation of being a thief. I was about 10 – 12 metres to the scene. I did not know the victim. The one beating him was known to me. I used to see him and he lived nearby. I can see him in court (Jeremiah identified the accused in court by pointing at him). I did not do anything. Other people came. Accused was saying that the victim had organized for theft at accused’s place..... The accused was very bitter and angry..... At the scene were security lights but a bit high. There was insufficient light to enable one to see far well.”

In cross examination, Jeremiah told the court that the accused was using a “rungu” to beat the deceased. He also said he saw the accused at the scene well and that he knew the accused lived at the place. Jeremiah was not cross examined on the issue of light at the scene.

On his part Felix testified as follows:

“As I was sleeping I heard noise outside and quickly went out. Someone was asking for help. It was around 3.00am on 22nd

August 2014..... At the scene I found two people fighting. It was Mustafa beating another man who was his friend. Mustafa had a “rungu”. I found the accused in court who I know as Mustafa and Edward the deceased fighting. Mustafa was claiming that Edward was bringing thieves to steal from him. Mustafa had a knife and “rungu”. He was using these to attack Edward who was lying on the ground. Edward was trying to call for help..... Mustafa was known to me and was my friend for four years. Edward was also a friend..... There was electricity light in the building near the scene.”

On cross examination, Felix told the court that:

“There were security lights. These were several bulbs of 100 watts. It was strong light and the area was well lit. The “rungu” accused held was wooden. I have not seen it in court. Mustafa had the “rungu” using it to hit the deceased while the deceased was on the ground and he had a knife in the other hand. By saying I found them fighting I meant that I thought they were fighting since they were friends..... The security lights were in a business building.”

I have also considered the evidence of Festus Obuoge (PW7), who told the court that when he arrived at the scene it was at night and dark and the evidence of Esther Kemunto (PW2) who told the court that she arrived at the scene at 5.00am and that it was dark and she had to use the flashlight of her phone to see. Rogers Mugire (PW1) testified that there was electricity light at the scene. The three witnesses arrived at the scene after the deceased had been assaulted. He was lying on the ground probably dead by the time these witnesses arrived. They all testified that the accused was not at the scene by the time they arrived. They did not witness the assault.

The inconsistencies in the evidence of Esther and Festus that the place was dark and that of Rogers, Felix and Jeremiah that there was electricity light is what caused the defense counsel to submit that the evidence of the prosecution witnesses is contradictory. I have considered the differences in the evidence and it is my view that Esther and Festus arrived at the scene after the deceased had been injured and had died. It is my considered view that their evidence that there was no light does not controvert that of the other three witnesses who stated that there was light. It is not lost to me that the assault took some time given the nature of injuries inflicted on the deceased. It is also clear to me that Jeremiah and Felix knew the accused before and theirs is evidence of recognition not identification. Taking into account that the assault took time and the two witnesses knew the accused before and testify to witnessing the assault, it is my finding that there is no mistake on their part that they saw the accused assaulting the deceased and they recognized him because they knew him before. According to their evidence, there was some light and they were able to see. I find the evidence by Felix and Jeremiah consistent that the accused had a “rungu” which he was using to assault the deceased and a knife in the other hand. Indeed the injuries sustained by the accused confirm that a blunt object (“rungu”) was used. There is also a stab wound to the jaw confirming to this court that a weapon (knife) that could cause a stab wound was also used.

After detailed consideration of the evidence against the accused, I find it sufficient to lead me to conclude that the inconsistencies noted in evidence are minor and do not dislodge the evidence by the prosecution that the accused is the one who assaulted the deceased. His defense that the deceased was killed by Maasai watchmen cannot be true and I hereby reject it. Consequently, I find that the prosecution has proved beyond reasonable doubt that the accused is the person who caused the unlawful death of the deceased.

The last element to consider is whether the accused acted with malice aforethought. The injuries sustained by the accused are severe. They concentrated around the head. The skull was fractured, both upper (maxilla) and lower (mandible) jaw bones were also fractured. It is my finding that by aiming mostly at the head of the deceased, the accused intended to cause the death of or grievous harm to the deceased. The same can be said about the repeated nature of the blows to the head of the deceased. For the skull to be fractured and both jaw bones to be fractured the accused must have hit the head of the deceased repeatedly. Only one conclusion can be made after taking into account the nature of these injuries that the accused’s intentions were not doubt to cause grievous harm or to kill the deceased.

In my view the authorities cited by the defense do not assist the accused in his defense firstly because this is not a case based on circumstantial evidence; secondly because the inconsistencies noted in the evidence cited above are minor and do not fatally affect the prosecution case and thirdly because the accused was known by Felix and Jeremiah who witnessed the assault.

My conclusion of this matter is that the prosecution has discharged its mandate of proving beyond reasonable doubt that the deceased died as a result of an unlawful act (assault) by the accused person with malice aforethought. I further make a finding that the murder charge against the accused has been proved beyond reasonable doubt. Consequently, I find the accused guilty of murder as charged and convict him accordingly. Orders to that effect shall issue.

Delivered, dated and signed this 18th day of October 2018.

S. N. Mutuku

Judge