



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NUMBER 59 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

SALIM OMONDI ODERA.....ACCUSED

JUDGMENT

Salim Omondi Odera, the accused, is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. Particulars of this offence are that on the night of 2nd and 3rd of March 2014 at University of Nairobi Kikuyu Campus he murdered James Mugane Muturi, the deceased. The accused denied committing this offence hence this trial. He is represented by Mr. Maina Muchiri, advocate.

Both the accused and the deceased were students at the University of Nairobi, Kikuyu Campus. On the evening of 2nd March 2014, the deceased and his roommate and friend Ephantus Maina Munyu, PW1, spent a normal evening. They lived in room 322. After they took their dinner, the deceased told PW1 to accompany him to visit some friends of the deceased, girls, in room 305. They stayed there until about 1.00am when they decided to leave and go to sleep. On the way to their room, the deceased asked PW1 to accompany him to Target Inn Bar to see his friends. The Bar was an establishment run by students. It had a drinking area and pool tables area. At the bar, the deceased met one Dismas, a friend, who bought him some drink (meakins vodka). PW1 did not want to drink. He decided to play pool instead. At the pool table he met one Moses who was tending to the bar and other people including Duncan Njoroge Mureithi, PW2. Moses was playing pool. He was called away shortly to serve a customer. He left his game incomplete. PW1 took the cue stick and continued playing the game. When Moses returned he accused PW1 of spoiling his game and a disagreement arose. It is at this stage that the deceased joined them and found the disagreement going on. He picked the cue stick to play pool and accidentally knocked Moses' drink that had been placed on the pool table. This annoyed Moses who demanded that the deceased buys him another drink. The deceased did not have money. He attempted to escape from the Bar but he was spotted by Moses and stopped. He was brought back to the bar. Moses picked the cue stick and hit the deceased on the head with it. The deceased fainted. The accused and Duncan, PW2, assisted in carrying the deceased to room 322. Evidence shows that the accused continued hitting the deceased on the head accusing him of having the habit of pouring their drinks.

In room 322 the deceased was placed on the bed, the lower deck, and left there. Moses, the accused and Duncan left the room. Evidence shows that the accused and Moses returned to room 322 three times that night. At one time they brought the cue stick and demanded that the accused must pay for it; they then came and picked the cue stick and on the third occasion they returned at about 6.00am and took deceased's wallet as security for payment for the cue stick. They took the wallet to the Campus Security Office. According to the evidence of Ephantus, PW1 and Daniel Nyamboga, PW3, who were roommates of the deceased, when the accused and Moses returned to room 322 in the morning at about 6.00am they tried waking the deceased up but he could not wake up. They thought he was pretending to be asleep and pulled him roughly off the bed. They took him outside the room and continued hitting him. When the deceased failed to wake up they left him. The deceased was taken to the Campus clinic but was referred to Kenyatta National Hospital where he passed on later while undergoing treatment.

The accused was arrested by security officers at Kikuyu Campus including Peter Mwangi Nderitu, PW5 and Michael Walumoli Nyongesa, PW4, on 9th July 2014. He was found at the Target Inn Bar where he was playing pool. He had been at large from the day the incident giving rise to this offence occurred until the day he was arrested.

In his defense, the accused explained his absence. He testified that on 2nd March 2014 he went to class until 9.45pm when he went to the Student Centre to photocopy and print documents; that at about 12.30am the deceased and Moses started a confrontation; that he went near the place of the confrontation to find out what was happening and learned that the quarrel between the Moses and the deceased was over spilt drink. He said he saw Moses hit the deceased on the head with a cue stick leading to the deceased collapsing. He said that Ephantus, PW1, asked him and Duncan, PW2, to assist in carrying the deceased to his room. He stated that they took the deceased to room 322 with Moses following them; that Moses demanded to be paid and a confrontation ensued between Moses and PW1. The accused said that he took charge of deceased's wallet which he took to the Security Office and recorded a statement. This was confirmed by Michael Walumoli Nyongesa, PW4 and Security Supervisor at Kikuyu Campus. The accused said that he left Campus the following day to go to do his research until 9th July 2014 when he returned to Campus to present the research. He said that he did not manage to present his research because he was arrested over this matter before he did so.

At the conclusion of the case for the defense, Mr. Muchiri for the accused submitted that the accused was not involved in hitting the deceased. He submitted that the accused is mentioned as having assaulted the deceased when he was assisting in carrying him to his room but Ephantus, PW1, did not explain how the accused could possibly carry the deceased and at the same time assault him. He submitted that Nyamboga, PW3, who shared a room with the deceased and PW1, contradicted PW1 when he said that the accused did not assault the deceased. He submitted that the first report made to the police did not implicate the accused and that he was only implicated in the second report captured in OB No.64. He submitted that the accused did not abscond but was away conducting his research. He submitted that the evidence by the prosecution does not prove the ingredients of murder. He submitted that the findings of the doctor who examined the body of the deceased are consistent with the evidence that the deceased was hit with a cue stick. He submitted that the accused did not take part in hitting the deceased with the cue stick and that the deceased did not recover consciousness after being hit by Moses and that the Investigating Officer failed to arrest Moses. He urged the court to find that the accused is not guilty of murder and acquit him.

Mr. Okeyo for the prosecution submitted that the prosecution has proved all the ingredients of murder against the accused to the legal standards and urged the court to find him guilty and convict him. He submitted that the unnatural death of the deceased due to blunt force trauma has been proved; secondly, there is evidence linking the accused to the death of the deceased and that there is eye witness account placing the accused at the scene of the assault both at the bar and in room 322 and thirdly that malice aforethought has been proved through evidence showing how deceased was assaulted from the bar to room 322.

Murder is committed when **any person who of malice aforethought causes death of another person by an unlawful act or omission** (see Section 203 of the Penal Code). The prosecution who bears the burden of providing that murder has been committed by the person under trial must prove all the ingredients of murder beyond reasonable doubt. The prosecution must prove death of the deceased occurred due to an unlawful act or omission by the accused under trial. The prosecution must prove malice aforethought on the part of the accused under trial. Malice aforethought is defined under Section 206 of the Penal Code which reads that:

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 or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is occasioned by indifference whether death or grievous harm 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 or any person who has committed or attempted to commit a felony.

On whether death of the deceased occurred, I have examined the evidence on record and considered the same. It shows without doubt that the deceased died on 7th March 2014 at Kenyatta National Hospital. The opinion of the pathologist as to the cause of that death is that it was due to head injury due to blunt force trauma. The body of the deceased was identified to the pathologist by his sister Anisia Njeri Muturi, PW6, a brother and a cousin. The evidence of Dr. Dorothy Njeru, PW9 and pathologist is that the deceased had three abrasions: on the outer aspect of left forearm measuring 2cm by 3cm; on the forehead on midline measuring 3cm and an extensive bruising on the skin covering the head on the front, side and back on the left side of the head. There was extensive bleeding in the substance of the brain. The death of the deceased, going by the recorded evidence, has been proved beyond reasonable doubt.

Mr. Muchiri raised issue regarding the injuries on the outer aspect of the forearm described by the pathologist as defensive injuries. He submitted the deceased could not have defended himself given the evidence that he lost consciousness after he was hit on the head at the Target Inn Bar. I have considered the evidence that there was a confrontation when the deceased was being brought back into the Bar after he had attempted to flee. I also note that he was pulled to his room which was located upstairs. He was also pulled from the bed to the corridor. It is possible that these injuries could have been sustained during any of those instances. This notwithstanding, it is clear from the evidence that the injuries described as defensive are not the injuries that caused the death of the deceased. In my view, whether those injuries were sustained during the confrontation before the deceased fainted or after during his rough manhandling, does not dislodge the evidence of the prosecution witnesses as shall be shown in this judgment.

In addressing the issue as to who caused the death of the deceased, I have considered the submissions by Mr. Muchiri that it is not the accused who assaulted the deceased but Moses. I have also considered the evidence of eye witnesses which I reproduce here below. Ephantus was with the deceased throughout that evening. Excerpts of his evidence are captured thus:

Moses picked the cue stick and hit deceased with it on the head. He fainted. Salim Omondi with Duncan picked him and asked me to show them where deceased lived. I told them I lived with him in room 322. They took him to the room. Salim Omondi continued hitting him on the head using fists telling him he was used to pouring their drinks.

In reference to the actions of the accused and Moses' return to the room, Ephantus continued to state that:

“Room had 2 double-deckers. The room was partitioned. They woke us up and continued to beat deceased. He was in the lower decker. They were telling him he had made errors. Salim continued hitting him on the head with fists. They pulled him out at the corridor outside the door. They were telling him that they would kill him”.

According to Duncan it was him and Ephantus who picked the deceased and took him to room 322 while the accused and Salim followed. His evidence is captured thus:

“I picked him with my friend Maina. We were followed by Salim and Moses. We took deceased to room 322. Salim assaulted the deceased. As we went to the room, Salim was hitting the deceased on the back. I was pleading with Salim to stop. I was afraid he would beat me. I put deceased on the bed.”

Duncan was cross examined on his evidence in chief. He told the court on cross examination that the accused assisted to carry the deceased at the stairs and that he and Maina picked the deceased from the ground. He said he could not remember whether the accused assisted to pick the deceased from the ground. Duncan did not reside in room 322 and did not witness what happened thereafter in the course of that night. This can be gathered from the evidence.

Daniel Nyamboga, PW3, was a classmate of the deceased and Ephantus. He was in the room when the deceased was taken there. His evidence is as follows:

“Muturi was brought in unconscious. He was placed on the bed. I had not slept and I looked at the deceased. I heard a disagreement that “you have broken a cue stick and must pay”. I did not know the people saying this but I was able to see them. They left after this. They came back again. They left the cue stick in the room. They came later and started beating Muturi thinking he was drunk. He was still unconscious. He could not talk and had not uttered a word. Maina was one of those who brought him. The people were saying he was pretending to be unconscious. They came a third time, almost in the morning. They took deceased’s wallet and Samsung phone as security for the broken cue stick. The same people came. They tried to wake him up. He showed no signs of consciousness. They pulled him from the bed to wake him up. Muturi could not stand and they pulled him from the bed. They were pulling him roughly. They took him outside. I did not involve myself with the issue. Security was involved and the deceased was taken to hospital. I do not recall them beating him. Accused in the dock is one of those pulling him. I did not know his name at the time. I recognize him as having seen him.”

On cross examination Daniel said that he did not see the people beating the deceased using kicks and fists. He however said that they pulled him outside from where security officers picked him. He also said that “I saw accused slapping deceased telling him to wake up and give him his cue stick”.

What comes out clearly from this evidence is that the accused took part in taking the deceased to room 322. He took part in assaulting him whether by slapping him or hitting him while the deceased was still unconscious. He took part in pulling the deceased from the bed to the corridor outside the residence while the deceased was still unconscious. He was not alone. He was with Moses whose full name was given to the court by CPL Evans Omanga, PW8, as Moses Nyagaka. According to PW8 who investigated this case, the accused and Moses went into hiding. Efforts to trace Moses were unsuccessful. He testified that the accused lived outside the Campus at Uthuru and that he was taken to the residence of the accused by the security officers from the Kikuyu Campus but they did not find the accused. Efforts to trace him at his rural home were not successful until July 2014 when he was arrested at the Campus by the Security Officers. Moses remains at large to date.

Although Daniel, PW3, seemed to contradict himself in his evidence he was clear both in his evidence in chief and in cross examination that the accused slapped the deceased thinking he was pretending to be drunk. Daniel seemed not bothered so much by the goings-on in his room and in that attitude it is possible that he may have missed what was going on in the lower decker. He told the court that he was in the upper decker.

Having taken into consideration the evidence of PW1, PW2 and PW3, it is my finding that the accused took part in one way or another in assaulting the deceased. The law under Section 20 of the Penal Code deems the following persons as principal offenders:

- (a) Every person who actually does the act or makes the omission which constitutes the offence;***
- (b) Every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;***
- (c) Every person who aids or abets another person in committing the offence;***
- (d) Any person who counsels or procures any other person to commit the offence.***

In any of the above scenarios, the person may be charged with actually committing the offence and in (d) above the person could be charged with counseling or procuring the commission.

Bearing this provision in mind and given the evidence as captured above, it is my finding that the accused cannot escape responsibility in this case. He took part in assaulting the deceased. He may not have been the initiator but he is culpable. As stated above in this judgment, the anomalies in the evidence of PW3 are minor and do not dislodge the evidence that the accused participated in assaulting the deceased even when he was unconscious. His actions cannot be excused. They exacerbated the condition of the deceased. Evidence from PW1 and PW3 is clear that in the early morning the deceased who was still unconscious was pulled roughly from his bed and taken to the corridor where security officers picked him and took him to hospital. In addition to this action, the accused is mentioned as having hit the deceased on the way to the room and while in the room.

Has the prosecution proved malice aforethought on the part of the deceased? Evidence shows that the accused joined in assaulting the deceased when he was already unconscious. The seriousness of his injuries is not known at that stage but nonetheless the accused assaulted him on the way to room 322 and while inside that room. He also took part in pulling him out of his bed to the corridor outside. To my mind the accused may not have intended to kill the deceased as defined under Section 206 of the Penal Code and therefore I harbour doubts in my mind that the prosecution has proved this ingredient of murder beyond reasonable doubt. With these doubts in my mind, I find that I am not able to conclude that the offence of murder has been proved to the required standard. Consequently, I find that the accused is not guilty of murder as charged and acquit him of that charge. However, I find that the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code has been proved against the accused beyond reasonable doubt. I proceed to find the accused guilty of the

lesser charge of manslaughter contrary to section 202 as read with section 205 of the Penal Code and enter conviction accordingly. It is so ordered.

Delivered, signed and dated this 4th day of October 2018.

S. N. Mutuku

Judge