



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL CASE NO. 76 OF 2015

THE REPUBLIC.....PROSECUTOR

=VRS=

1. RICHARD NYAIKA OMUGA.....1ST ACCUSED

2. RONALD NYAIKA NYANUMBA.....2ND ACCUSED

3. JONES NYANDIKA NYARIBO.....3RD ACCUSED

JUDGEMENT

The accused persons are charged with Murder Contrary to Section 203 of the Penal Code as read with Section 204 of the Penal Code. The particulars of the charge are that on 16h January 2011 at Ekerenyo Shopping Center in Nyamira County within Nyanza Province they murdered Agaki Omaore.

The accused persons pleaded not guilty to the charge. To prove its case, the prosecution called five (5) witnesses out of who two (Pw1 and Pw2) were recalled for cross examination when one of my predecessors took over the case.

Briefly the prosecution's case is that on the fateful day the deceased learnt that his sister Edna (Pw1) was not at Bugema University in Nyamira Town where he had sponsored her to undertake a computer course. He traced her to the house of her boyfriend (1st accused) and demanded to know why she was not in college. According to Edna (Pw1) he was armed with a cane which he used to beat her demanding to be told what she was doing there. The 1st accused fled the house but when the deceased said he wanted to speak with him Edna (Pw1) called him and he returned to the house. It was then that the deceased said they would discuss the matter at the police station instead of the 1st accused's house. The 1st accused obliged but along the way the deceased started beating the 1st accused and at that juncture a fight broke out between them. Edna (Pw1) told the court that it was at that juncture that the 2nd and 3rd accused who are the 1st accused's cousins came to the scene and when she saw the 2nd accused draw a knife from his pocket she ran away to hide. In the meantime, the deceased had called his brother Jackson Ndubi (Pw2) and cousin Evans Ndubi (Pw4) to the scene who on arrival at the scene and on seeing the 1st accused stab the deceased with a knife, Jackson went to report the matter to Ekerenyo Police Station.

The police officers were held up in another matter so Pw4 went back to the scene and got a vehicle to take the deceased to hospital. He died before they got there. Pw2 told the court that the 2nd and 3rd accused were also armed with knives while Pw4 stated that they stood by the 1st accused. A post mortem done on 19th January 2011 revealed that the cause of death was cardiopulmonary arrest due to intrapleural haemorrhage/lung puncture due to penetrating trauma to the chest. The post mortem report was produced in court by Dr. Lilian Kerubo Bosire (Pw3) a Medical Officer then based at Nyamira District Hospital, who did the post mortem on 19th January 2011 at 10.15 am.

The case was investigated by one PC Yumbi who did not come to testify. In his place, the prosecution called PC Maureen Auma (Pw5) who testified that she took over the file from PC Yumbi when he was transferred to Siaya in the year 2016. Her evidence followed what PC Yumbi had recorded in his statement.

When this court put the accused persons on their defence, the 1st accused elected to make an unsworn statement while the 2nd and 3rd accused opted to give sworn testimonies. The 1st accused called two witnesses and the 2nd accused called one witness. The 3rd accused did not call any witnesses.

The 1st accused stated that at the material time he was a boda boda rider. He confirmed that on the material day at about 4.30pm his girlfriend Edna (Pw1) called him from his house. He stated that on arrival he found a big crowd and was shocked at the big number. He

stated that an elder pulled him aside and told him the crowd was there in response to Edna's screams following a beating by her brothers. He stated that the deceased had a rungu so he got scared and persuaded him that the best thing was to settle the matter at the police station. The 1st accused stated that the deceased got hold of his shirt and started beating him with the rungu before stabbing him with a knife on the left ear. He stated that he got a thorough beating from the deceased which did not stop even when elders intervened. He contended that he had to use reasonable force to get away from the deceased who was in the company of his two cousins. He stated that when he got a way of escape the crowd restrained the deceased from following him. He was taken to hospital by Isaac Ondieki a fellow boda boda. He produced a treatment chit (Exhibit D1) and contended that he acted in self-defence.

The 2nd accused maintained his plea of not guilty and testified that he was at a crusade when he heard some noise and saw people running in the direction of the 1st accused's house. He went there with the 3rd accused who had accompanied him to church and thereafter to the crusade. He stated that when they reached the 1st accused's house they found 1st accused fighting with the deceased, Pw2 and Pw4 and the 1st accused was bleeding on the left eye brow. The deceased however repulsed them forcing them to flee. He denied that he was armed with a knife and stated that it is the deceased who had a knife and a rungu. He also narrated how he was picked from his house by police officers the next day to help them with investigations only to be charged with this offence. He stated that while he was at the police station he was compelled to sign a statement without being afforded an opportunity to read it. The 2nd accused poked holes into the evidence of the prosecution witnesses saying that it was inconsistent. He admitted that the 1st accused was his cousin and revealed that the 3rd accused was his nephew.

The 3rd accused narrated how on the material day he had gone to Church with the 2nd accused and how while they were at a Crusade at Ekerenyo they heard shouts which led them to the house of the 1st accused. Like the 2nd accused, he testified that they found the 1st accused fighting with the deceased who had a rungu and a knife, and the other persons named by the 2nd accused. He stated that after they were chased by the deceased they went home and he did not go back to the scene. He contended that he was later arrested about 8 or 9 kilometers away from his home and that the statement that was recorded on his behalf was not read back to him. The 3rd accused stated that of the people who were fighting only the deceased had a knife. He denied that he and his co-accused killed the deceased.

Amos Ondieki (Dw4) testified that he was present when the 2nd accused was picked by two smartly dressed men on 17th January 2011. He stated that the two men said the 2nd accused was going to help them with investigations.

Isaac Ondari Makuoro (Dw5) stated that he took the 1st accused to Ekerenyo hospital on 16th January 2011. He stated that the 1st accused had an injury on the face. From the hospital he took the 1st accused home.

Thomas Omunga (Dw6) told the court that the 1st accused was his son. He confirmed that the 1st accused was taken to his home by Dw5, a fellow boda boda. He stated that the 1st accused who had a bandage on the face spent that night at home. He did not however tell him (Dw6) what had happened or how he had sustained the injury on his forehead.

In summing up, Mr. Ondigo, the Learned Advocate for the accused persons urged this court to find that the prosecution has not proved its case beyond reasonable doubt. He submitted first that the investigating officer did not testify and that Maureen Auma (Pw5) who testified on his behalf was not competent to do so as she was not familiar with his handwriting or signature. Mr. Ondigo submitted that the witness had proved incompetent to answer questions in cross examination and it is as if the case was never investigated. On the evidence of the other witnesses, Counsel submitted that their evidence was inconsistent and further contended that the knives alluded to by the prosecution witnesses should have been produced. He submitted that given the totality of the evidence the issue to be considered by this court is whether the 1st accused was entitled to self-defence. He urged the court to find that the case had not been proved to the standard required and acquit the accused persons.

On his part, Mr. Ochieng, Learned Counsel for the prosecution, submitted that the case was proved beyond reasonable doubt. He submitted that it is not in dispute that the deceased and the accused persons were involved in a brawl the reason being that the 1st accused was having an affair with the deceased's school going sister; that it is also not in dispute that the 2nd and 3rd accused were at the scene when the fight broke out and that evidence had been adduced that the 2nd and 3rd accused were also involved in the fight and that it was the 2nd accused who gave the knife (murder weapon) to the 1st accused. He submitted that there was overwhelming evidence that the three accused persons had the mens rea to kill the deceased and this court should convict them. **Section 203 of the Penal Code** which creates the offence of Murder states: -

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

To succeed therefore the prosecution must prove that the person (s) before the court caused the death of the deceased person by an unlawful act or omission and of malice aforethought the burden of proof being beyond reasonable doubt. What constitutes malice aforethought is defined under **Section 206 of the Penal Code**.

Having evaluated the evidence by both sides carefully and having also considered the submissions of the Advocate for the accused persons, it is my finding that the prosecution has not proved its case against the 2nd and 3rd accused persons beyond reasonable doubt. For the 3rd accused there was no evidence pointing to his guilt at all save for the testimony by Jackson Ndubi Omaore (Pw2) that he saw him (3rd accused) brandishing a knife. This was in contradiction to the evidence of his sister Edna (Pw1) whose evidence was that the only person who she saw with a knife was the 2nd accused. Even then Pw1 changed her mind when upon being recalled, in further cross examination by Mr. Kaburi, the Advocate then acting for the accused persons, she stated: -

“Before I left I did not see the 2nd and 3rd accused at the scene.”

On being re-examined she stated: -

“Because there were many people at the scene, I cannot confirm whether or not 2nd and 3rd accused persons were at the scene.”

This inconsistency creates doubt as to whether the 2nd and 3rd accused persons took part in the fight that led to the death of the deceased. It is instructive that Pw1, Pw2 and Pw3 point to the 1st accused as the person who fought with the deceased and Pw2 seemed to contradict himself when he said that the 2nd and 3rd accused charged towards him with knives when he tried to separate the fighting duo. Where there is doubt the benefit of that doubt goes to the accused not the prosecution and accordingly I give the accused persons the benefit of doubt and find that whereas the evidence of the witnesses for the prosecution and their own defence places them at the scene of the crime, there is no evidence that they participated in it. They shall accordingly be acquitted.

For the 1st accused person there is evidence that the deceased attacked him. According to Edna (Pw1) the deceased lured the accused from his house on the pretext that they were going to settle the matter at the police station but along the way he began assaulting the 1st accused with the same cane he had used to beat her. The deceased was incensed that his sister had left college and gone to the 1st accused's house. Initially the 1st accused had fled his house when the deceased started beating his sister but he went back when she called him. Clearly the deceased was the aggressor. The 1st accused raised the defence of self-defence. Section 17 of the Penal Code states: -

“Subject to any express provisions in this code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law”.

Under the Common Law the general principle is that the law allows such force to be used as is reasonable in the circumstances as the accused believed them to be, whether reasonably or not and the question then becomes **“was the force used reasonable in the circumstances?”** – See **Smith & Hogan – Criminal Law Tenth Edition: JC Smith Page 276. (See also Palmer V. Republic [1971] 1 ALLER 1077).**

The prosecution's evidence that the deceased attacked the 1st accused militates against this court finding him guilty of Murder as it avails the defence of self-defence to him. However, it is my finding that the force the 1st accused used was unreasonable in the circumstances. The deceased was only armed with a stick but the 1st accused used a knife to stab him not once but several times. The post mortem report shows that the deceased had four (4) cuts one on the right shoulder 5cm long, another on the left arm 4cm in diameter, a third cut on the left axilla region 3cm wide and the fourth on the back posteriorly. One of the cuts punctured his lung. It is my finding that the use of such unreasonable force was not justified and whereas the 1st accused may not be guilty of murder he nevertheless unlawfully caused the death of the deceased.

Accordingly, I find him guilty of Manslaughter contrary to Section 202 of the Penal Code as read with Section 204 of the Penal Code and convict him accordingly.

The 2nd and 3rd accused persons having been found not guilty and acquitted are free unless otherwise lawfully held. It is so ordered.

Signed, dated and delivered in open court this 11th day of December 2018.

E. N. MAINA

JUDGE