



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL CASE NO.31 OF 2015

REPUBLIC.....PROSECUTOR

Versus

GEOFREY JUMA MWANGA alias JOHN.....ACCUSED

JUDGEMENT

GEOFREY JUMA MWANGA alias JOHN, the accused person in this matter was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code Cap 63 of the Laws of Kenya specifically the particulars of the charge are that on the 16/6/2015 at Birika township within Isinya Sub-County, of Kajiado County accused jointly with another not before court murdered Christopher Sitonik Ontet. The accused who was represented by Mr. Itaya denied the charge, while the prosecution was conducted by Mr. Alex Akula, senior prosecution counsel. The accused pleaded not guilty to the charge.

The prosecution called thirteen (13) witnesses to prove the guilty of the accused person whose evidence can be summarized as follows:

PW2 Alphonse Muthama was at his place of work on 16/6/2015 where they harvested sand for customers. It was while on duty PW2 heard a voice of a woman whom he could not identify at the same time some two men walking alongside crossing to the other side of the road. He was however to learn in the morning that the deceased whom he knew was murdered the previous night.

PW3 Isaac Soita a sand harvester testified that on 16/6/2015 after getting his pay he went to a bar nearby for refreshments. In company of John Kimosi and Geoffrey Kimeto they had some beers before the bar close and the owner of the bar chasing them out. According to PW3 he went to his house to sleep at about 10.00 pm. Further in his testimony PW3 stated that his house mate Victor one whom they shared a house found him later. According to PW3 the house mate who was wearing a grey/red striped t-shirt with colours of Kenyan flag offered to sell his phone but PW3 did not have the money to pay for it. It is further testimony of PW3 that he decided not engage on any conversation on the sale of the phone and retired to bed. When PW3 woke up in the morning a bag containing his clothes, and shoes was missing. It is at that stage he went to check the whereabouts of his colleague Victor but was also not in the house. PW3 in his evidence was able to identify the accused as one of the persons he shared a social evening with in the bar at Birika township.

PW4 Lilian Achieng testified on how he accompanied Grace the wife of the accused to take a neighbour by the name Dan to the hospital. The man who was said to be indisposed was traced in the bar with the accused person. In the testimony of PW4 the accused and one Victor came back to the plot. In a short discussion one Victor refused to leave the house. It is further PW4 testimony that one Grace wife to the accused called in seeking to be given a portion of omo-soap to clean some blood stained left on the seat

used by Victor.

PW5 Protas Wafula who was the farm manger where the accused worked testified on the report he received about Victor not being at the work place. PW5 further stated that earlier in the day the accused had invited him to go to the centre so that they could have beers together. PW5 testified that he declined the invitation from the accused and advised that he could take drinks to where they stayed. PW5 further testified that he was to receive a report on the absence of one Victor and theft of clothes belonging to PW3. According to PW5 he had to receive a report on someone who had been stabbed but was not at that scene.

PW6 Isaiah Maleya the care taker confirmed to this court that the accused was his tenant during the period under review. PW6 further testified that on 16/6/2015 at about 10.00 pm he opened the gate for the accused who had been away as per the information from the wife.

PW7 ACP Mwema told this court that he received a murder report and information about a suspect by the name Victor whom he effected arrest to be investigated for causing the death of the deceased.

PW8 Sgt Cherotich gave evidence on action taken after a murder crime was reported at Birika AP Camp. According to PW8 in company of other police officers they visited the scene and that on their way the victim was being rushed to the hospital. As the victim had passed on due to the injuries sustained PW8 testified that investigation on the incident was commenced. It is through the leads on the investigations which caused the arrest of the accused and another not before court as suspects for the crime.

PW9 Lincoln Gitau who works at the psychiatric clinic at Kajiado hospital assessed mental fitness of the accused in the report produced in court as exhibit 2. PW9 confirmed the accused to be in good mental status to stand trial and follow proceedings in court.

PW10 Juliana Murugi testified on how she saw some three men pushing and pulling each other on 16/6/2015 at about 9.30 pm. PW10 further alleged that after a few minutes the two men left leaving one of them at the scene. That is when by use of a touch she went to check only to find the man on the ground bleeding. According to PW10 she did not know the two men though she identified one of them was wearing a red t-shirt. As regards the man who was left on the ground bleeding, PW10 was able to identify him as one of her customers.

PW11 Dr Serah Kaggia, the pathologist testified on the postmortem examination done on the body of one Christopher Sitonik the deceased. According to the evidence of PW11 the deceased body had multiple injuries being three stab wounds on right anterior chest wall, cut wound on the sternum right sterna border, cut wound 3.2 cm in length, 11 cm from the clavicle, cut wound on the upper left ear, penetrating cut wound to the 3rd rib with fracture of the rib, upper side of the right lung, penetrating cut wound through the right side of the diaphragm, penetrating would to the right lobe of the liver, cut wound fracture on the 5th rib, hemothorax of the lung, cut wound on the temporal left side penetrating to the brain, linear fracture on left temporal bone, subdural with abarachiriod hematoma. PW11 opined the cause of death to be head injury secondary to multiple penetrating stab-wounds.

PW12 Lucy Warutere a government analyst carried out a DNA analysis on the blood sample of the deceased and a t-shirt in a khaki envelope indicated as that of the accused. The DNA analysis meant to generate a match between the blood sample of the deceased and the blood stained t-shirt failed to give any positive findings capable of creating the required nexus.

PW13 PC Francis Kahisha of Isinya Police Station testified on the investigations carried out regarding the death of the deceased. In the testimony of PW13 the deceased death was occasioned by the accused and another not before court when they went out to drink beer. According to the testimony by PW13 the fight between the accused, and the deceased escalated to a level where the knife in possession of the accused was used severally to inflict sharp wounds on the deceased. Taking into account the evidence from the witnesses, the postmortem report and the statement and the statement of PW10 he caused the accused to be charged with the offence of murder.

The accused was put on his defence where he elected to give unsworn statement. The accused admitted coming into contact with one Victor but denied that he was involved in the killing of the deceased. The accused further stated and gave an account of his movement and none of those times was he at the scene of the crime.

Mr. Itaya learned counsel for the accused submitted and urged this court to acquit the accused for failure of credible evidence to incriminate him with the offence. In so far as the evidence adduced is concerned learned counsel submitted the facts proved and established did not place the accused at the scene of the murder.

Mr. Akula, the senior prosecution counsel on his part argued that the evidence of the thirteen (13) witnesses proved the case against the accused person beyond reasonable doubt. Mr. Akula advanced the prosecution case to contend that the elements of the offence were all proved. In the first instance Mr. Akula, submitted that the death of the deceased was proved by the testimony of PW1, PW2 both of whom did identify the body to PW11 the pathologist who carried out the postmortem.

Secondly on the unlawful death of the deceased learned counsel submitted that the prosecution summoned and examined PW2 and PW10. Mr. Akula further laid emphasis on the recovery of the blood stained t-shirt analyzed by PW12 Lucy Wachira the government analyst. Mr. Akula advanced the argument on the findings by Dr. Kaggia who performed the postmortem which established grievous harm suffered by the deceased.

Thirdly on malice aforethought Mr. Akula placed reliance on the postmortem report by PW11 and the evidence of PW10 and PW2 on the attack of the deceased on 16/6/2016 at about 9.30 pm. Mr. Akula emphasized and invited the court to refer to the autopsy report produced by PW11 Dr. Kaggia which outlines clearly that the deceased suffered multiple skeletal injuries inflicted with a sharp object. According to Mr. Akula the autopsy report recorded the severe injuries particularly to the head which in his view was calculated to occasion death of the deceased. In this submissions Mr. Akula placed reliance on the following authorities; *Republic v Godfrey Ngotho Mutiso [2008] eKLR, Morris Aluoch v Republic Cr. Appeal No. 47 of 1996, Republic v Tubere S/O Ochen [1945] 12 EACA 63, James Masomo Mbatha v Republic [2015] eKLR, Republic v Daniel Onyango [2015] eKLR.*

The legal principles in the above authorities according to Mr. Akula when applied to this case demonstrate that whoever killed the deceased had malice aforethought. It was also the submissions of Mr. Akula that the prosecution tendered sufficient evidence by Alphonse Muthama PW2, PW10 Juliet Muruki Kipara and the testimony of PW3 Isaak Soita. Mr. Akula pointed out PW10 saw some men struggling in a push and pull scenario. In a little while the two men ran away leaving one on the ground at the scene. The one left became the deceased person. According to Mr. Akula the testimony of PW3 the accused and one Victor were seen at the Asiz bar on the 16/6/2015. In further submissions Mr. Akula contended that the evidence by PW4 Lilian Onyango, PW5, Protas Wafula and PW6 Isaiah Muleya goes to by way of circumstantial evidence places the accused at the scene of the crime together with the fugitive Victor Okumu.

Based on the above evidence Mr. Akula cited the case of *Mohammed & 3 Others v Republic [2001] eKLR, Mwangi & Another v Republic [2004] 2KLR 32* for the legal proposition that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt.

I have heard the evidence, the rival submissions for both counsels on various issues which emerged in this trial. In this regard I will endeavour to deal with each element of the offence so as to effectively make a finding as to whether the prosecution proved the guilt of the accused person beyond reasonable doubt.

(a) The death of the deceased:

The prosecution adduced the evidence of PW1 Joshua Parantai a brother to the deceased who identified the body to the pathologist at Kajiado District Mortuary on 23/6/2015. The fact of the death of the

deceased was corroborated by PW11 Dr. Kaggiah by the postmortem report exhibit 3. According to PW11 the cause of death was head injury secondary to multiple penetrating stab wounds due to assault. The prosecution also adduced the testimony of PW10 Juliet Kipara who was the first person to visit the scene where the assault took place and saw the deceased on the ground dead. The accused in his unsworn statement has not disputed the death nor challenged the evidence by the prosecution.

Accordingly I find this element proved beyond reasonable doubt.

(b) The unlawful death of the deceased:

Under section 203 of the Penal Code, killing another human being is unlawful act accompanied with malice aforethought is murder. It is trite that every killing of a human being is presumed unlawful unless it is committed in execution or advancement of justice, or reasonable defence of person or property. It is therefore left to the offender to rebut that presumption and bring himself or herself within the exceptions of the law. See the case of *Gusambizi S/O Wesonga v Republic [1948] 15 EACA 63.*

The unlawful act becomes the *actus reus* of the offence. The learned counsel for the state relied on the evidence of PW2, PW10, PW11 and PW12 to bring forth the prosecution case on the death of the deceased being unlawful. The accused denied that he was involved in any way with the killing of the deceased. According to the accused the wife and one Grace had asked that he assist to take a neighbour to the hospital. It was while on his way home he met one Victor Okumu who appeared to have an injury to one of the fingers. According to the prosecution case PW10 Juliet Muruki Kipara saw three men pushing and pulling each other. In the aforesaid circumstances PW10 further saw the two leave while the one remained on the ground when she went to check by use of a torch light. According to PW10 the man had suffered bodily harm.

It is apparent from the testimony of PW10 the man who became the deceased was attacked and assaulted. In establishing the fact of assault the prosecution relied upon the postmortem report prepared by Dr. Kaggiah PW11 on the deceased Christopher Sitonik. The same revealed cut wounds to the right anterior chest, mid-clavicular line, penetrating cut wounds to the sternum, clavicle, upper border of the left ear, temporal, head, lungs etc. From the opinion of PW11 Dr. Kaggiah as to the cause of death, there is a vital link in the nature of the injuries and subsequent death of the deceased. The statement of PW10 reveals that prior to the deceased being injured two unidentified men were seen having an altercation with the deceased. This evidence of PW10 and PW11 is vital for the prosecution to demonstrate that the death of the deceased was unlawful. I find therefore this element proved beyond reasonable doubt.

(c) Whether in killing the deceased the perpetrator had malice aforethought:

The accused faces a murder charge. The offence is committed when a person caused the death of another by some unlawful act or omission and was motivated by malice aforethought. Malice aforethought is defined under section 206 of the Penal Code and as what constitutes the element. The code provides as follows:

“Malice aforethought shall be deemed to be established by evidence providing 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 death or grievous harm to some person, whether that person is the person killed or not, accompanied by indifference whether death or grievous injury occurs or not or by a wish that it may not be caused.

(c) An intention to commit a felony.

(d) An intention by the act or omission to facilitate the fight or escape from custody of any person who has committed or attempted to commit a felony

From these provisions the prosecution must prove that the accused had the necessary intention to cause death or grievous harm to the deceased and that it was the injury which led to the death of the deceased. In *Bonaya Tutui & Another v Republic [2015] eKLR* the court observed that, malice aforethought is *mensrea* for the offence of murder and it is the presence or absence of malice aforethought which is the decisive factor in determining whether the unlawful act amounts to murder or manslaughter. Whether or not malice aforethought is proved in any prosecution for murder depends on the peculiar facts of each case.

The Court of Appeal in *James Masomo v Republic [2015]* observed that the nature of injuries can be manifestation of malice aforethought. The court held:

“In the present case the slier force of the wounds on the deceased are indicative of malice aforethought. Phyllis had a cut in the head region which extended to the skull bones, and exposed the brain. In addition, she suffered a deep cut on her right hand with a fracture of the right hand. She also had cuts on her legs and suffered burns. Everyne Nditi Nyamai had deep cuts on the right elbow and several cuts on the skull. Susan Mbithe also had two deep cuts which extended to the brain and Elijah Kasyoki had deep cuts on his skull which also extended to the brain. Surely in inflicting these wounds on the deceased the appellant intended to cause them fatal harm.”

In *Republic v Daniel Onyango Omoyo [2015] eKLR* the court observed interalia in respect of section 206 of the Penal Code:

“It is to be noted that once the prosecution proves one or a combination of the above circumstances, malice aforethought will be deemed to have been established and in such a situation there would be no escape route for the accused person.”

From the evidence of PW10 it was clear that the two men in the dark were assaulting the deceased. The time of the attack was in or about 21.30 pm when PW10 heard a bang of something being hit. According to PW10 she reached at the scene by use of a torch. She saw the deceased who was known to her having sustained physical injuries. The assailants targeted various parts of the deceased more specifically the head. In addition the deceased body had multiple deep cut wounds on the upper limbs, the liver, and the lungs. According to PW11 Dr. Kaggiah who conducted the postmortem the probable type of a weapon used to inflict the injuries was a sharp object.

I am alive to the fact that the murder weapon in this case was not recovered. However the inference I draw from the evidence is that the nature of the assault was grievous harm which eventually occasioned death in a stint of time. This can be deduced from the testimony of PW10 who on arrival few minutes after seeing the pull and push the deceased had already passed on. The attackers left the scene without assisting the deceased in anyway including taking action to have him visit a medical facility. The escape of the assailants is another pointer that they had malice in committing the offence.

I am satisfied that the prosecution has proved the ingredient of malice aforethought beyond reasonable doubt.

(d) The identification of the accused and placing him at the scene of the murder:

The case against the accused as presented and submitted by the prosecution was purely circumstantial. The principle of law on circumstantial evidence is that the inculpatory facts must be incompatible with innocence and incapable of explanation upon any other hypothesis than of guilt. In the case of *Simon Musoke v Republic [1958] EA 715* the court held interalia:

“It is also necessary before drawing the inference of the accused guilt from circumstantial

evidence to be sure there are no other co-existing circumstances which would weaken or destroy the inference.”

In this case I remind myself of the strict and statutory principles laid down in the case of Rona v Republic [1967] EA 583 where the court held:

“Subject to certain well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lesser the need for testing with the greatest care the evidence of a single witness respecting identifications, especially when it is known that the conditions proving correct identifications were difficult. It such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to the guilt, from which a judge or jury can reasonably conclude that the evidence of identifications, although based on the testimony of a single witness, can safely be accepted is free from possibility of error.”

The prosecution argued its case on PW2 who stated to have heard screams from a woman with an exclamation “*wamungia huku*” and one of them call out the name of John. In addition the prosecution placed reliance on the testimony of PW10 who told this court that at a distance of 50 metres she saw three men in a kind of pull and push. According to PW10 the two of three men left. When she went to the scene, the other man lay on the ground with injuries. In the testimony of PW10 she was not able to positively identify the two men at the time when she observed the three together. It was further the case for the prosecution through evidence of PW3 to the effect that the accused and one Victor were drinking at Asiz bar on 16/6/2015. PW3 further alluded to the fact that one Victor and the accused worked at the same farm including staying in the same house. In addition the prosecution placed reliance on PW5 who testified that early in the day on 16/6/2015 he had been invited by the accused to go to Asiz bar to have some beers together.

The other piece of evidence for the prosecution was that of PW4 Lilian Onyango regarding the identity of the accused being known by the alias name John and Victor by an alias name of Swag. According to PW4 in company of the accused wife Grace they went to a bar where accused was drinking and agreed to take Dan’s wife to the hospital. From the testimony of PW13 PC Karisa the recorded statements from witnesses showed that the accused and one Victor where the last people to be seen together with the deceased. PW13 in his investigations placed reliance on the evidence of PW3, PW5 and PW10. The prosecution further extracted the blood stains of the deceased which was to be marched with the blood stained t-shirt indicative of that of the decease. The analyst PW12 upon analysis concluded that there was no DNA match between the blood stained t-shirt and the blood sample of the deceased.

I have carefully appraised the evidence by the prosecution on identification and placing him at the scene. My view is as follows:

The prosecution evidence reliance on the blood stained t-shirt taken to the government analyst for blood grouping produced negative result to link the accused with the offence. Without this claim of evidence it is not possible to say whether or not the accused clothes were or were not at one stage in contact with the deceased blood stained clothe.

After due and careful consideration PW2 and PW10 never gave any description of the assailants. PW10 appeared to this court to testify as an eye witness but her evidence was turned out to be circumstantial evidence on what transpired on 16/6/2015 at 21.30 hrs. It is observed that since the conditions of positive identification were unfavourable even on identification parade was not practicable. There was no nexus created by the prosecution between the presence of the accused in the bar and subsequence assault of the deceased. There is this evidence by PW3 making reference to the owner of the bar explaining about a wrongful act against some person. What is intriguing about PW2 testimony he made no mention as who was the victim on the assailant in that act which he was informing PW3. The owner of the bar identified only as Mackenna by PW4 was never called as a witness to shade light on what she knew about the murder.

The chain of events by PW1, PW2, PW3, PW4, PW5, PW6, PW7 and PW13 highlight circumstantial evidence in respect of Victor Okumu and not the accused person. According to PW8 during cross-examination by the defence counsel he did introduce the name of accused person as being present at the scene of the murder in company of Victor Okumu. That evidence by PW8 fell short in giving material particulars and source of credible information as to when and how the accused participated in killing the deceased. The prosecution has failed to establish a nexus between the accused and the fatal injuries on the deceased. There is positive evidence that the accused was drinking in Asiz bar on 16/6/2015. He was in company of other customers including the accused person. It is also on record that at one time on the same day the accused left the bar to go and assist in taking a neighbour's wife to the hospital. There is also cogent evidence that at one time on the same day Victor went to the house of the accused. The said Victor though occupying the house with the accused was never to be seen until when he was suddenly arrested as a suspect to this murder.

What the prosecution failed to do in all the circumstances of the case was to tell this court how the accused killed the deceased. We are also not told where was the deceased prior to his death and at what time did accused participate in causing the death of the deceased. The injuries to which the deceased succumbed to death can be traced to the night of 16/6/2015 at 21.30 hrs but there is not direct or circumstantial evidence the accused inflicted the injuries. The prosecution had a duty to adduce evidence to prove that the deceased person was killed by the accused. I am cognizance of the fact that the prosecution case was premised that accused was seen with one Victor Okumu. Secondly the presence of red t-shirt won by the accused in the Asiz bar, was also introduced to the case as a link to incriminate him with the offence. It is this set of circumstances the prosecution urges this court to draw an inference to point at the accused as the perpetrator of the crime.

When applying the legal principles in Simon Musoke Case (Supra), Teper v Republic AC 480 at 489, Elias Abanga Onyango v Republic [1990] 320 it is clear that circumstantial evidence is of such a nature that it cannot form basis which points irresistibly to the guilt of the accused person.

I have evaluated the evidence and particular instances that led to the arrest of the accused. All what the witnesses have said was to suggest that one Victor and accused had acted in concert to murder the deceased. There is no evidence on positive recognition and identification to create a nexus with the fatal injuries suffered by the deceased on the fateful day. What that rendered in finality was a case based mainly on strong suspicion.

This point of law was discussed in the case of Mary Wanjiru Gichira v Republic Cr. Appeal No. 17 of 1998 where the Court of Appeal held that:

“Suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. Before a court of law can convict an accused person of an offence, it ought to be satisfied that the evidence against him is overwhelming and points to his guilt. This is because a conviction has the effect of taking away the accused’s freedom and at times his life.”

In this case yes I find killing of another human being was caused unlawfully and with malice aforethought. However the prosecution failed to positively identify the accused and place him at the scene of the crime. I am therefore of the conceded view that the prosecution has not proved the case beyond reasonable doubt to warrant this court enter a verdict of guilty for the offence of murder contrary to section 203 as read with section 204 against the accused.

Accordingly I dismiss the charge and acquit the accused person of the offence. The accused person is at liberty unless otherwise lawfully held.

Dated, delivered and signed in open court at Kajiado this 2nd day of May, 2017.

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R. NYAKUNDI

JUDGE

Representation:

Mr. Akula for the Director of Public Prosecutions present

Mr. Itaya for the accused present

Mr. Mateli Court Assistant

Accused - present