



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL CASE NO. 39 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

GEOFFREY AMIANI LUMIRA.....ACCUSED

JUDGEMENT

Geoffrey Amiani Lumira, hereinafter ‘the accused’, is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the charge are that on the 28th day of April 2014 at Muthurwa Market within Nairobi County he murdered Bernard Otoro, hereinafter ‘the deceased’. The accused pleaded not guilty to the charge.

To prove its case the prosecution called nine (9) witnesses. It is the duty of the prosecution to prove beyond reasonable doubt that the death of deceased occurred and the cause of that death; that the accused is the person who caused that death and that in causing the death of the deceased the accused possessed malice aforethought.

The prosecution case is that on 28th April 2014 at about 10.00pm, the deceased who was guarding a bananas store at Muthurwa Market in Nairobi disagreed with one Kareti over some money. The deceased is said to have hit the said Kareti who ran away and shortly thereafter came back with a group of young men. One of the young men was the accused before this court. The accused picked a piece of firewood placed near the bananas store and hit the deceased three times on the head knocking him down. The group of youth including the accused person ran away from the scene.

With the help of PW2, PW4 and other sympathizers, and assistance of the police on patrol, the deceased was taken to Kenyatta National Hospital where he was admitted. He died three days later while undergoing treatment at the same Hospital. The accused was arrested on 16th May 2014. After investigations he was charged with this offence.

The accused in his defence denied hitting the deceased. He testified under oath and told the court that about 10.00pm on 28th April 2014 he closed work at Muthurwa Market where he used to offload farm produce. He found a crowd gathered at a road in Muthurwa and he got curious to know what was happening. He saw an injured security guard seated with another security guard telling the gathered members of public that the injured guard had been fighting.

The accused told the court further that he was arrested by a police officer from Kamukunji Police Station after the officer, who knew him before this incident, demanded Kshs 2,000 from him; that the police officer had arrested him on several occasions before over touting offences when the accused used to work as a tout.

I have carefully read all the evidence from the prosecution and defence sides. I have also read the submissions by Ms Ekin for the accused and those of the prosecution. Ms Ekin pointed out the contradictions in prosecution evidence specifically in the evidence of the two eye witnesses Julius Aswani Omwerema, PW2 and Bernard Washington Osiru, PW4. She found fault with the evidence on identification of the accused and urged the court to find that the prosecution has failed to prove this case beyond reasonable doubt. Ms Ekin urged this court to find the accused not guilty and acquit him forthwith. She relied on the following cases to support the defence case:

- i. **Solomon Kirimi M’rukaria v. Republic, HCCR Case No. 46 of 2011 reported in [2014] eKLR.**
- ii. **Prosecutor v. Moureen Atieno Oduor, HCCR Case No. 38 of 2014 reported in [2016] eKLR.**
- iii. **Geoffrey Muli Kyalo v. Republic, HCCR Case No. 134 of 2012 reported in [2015] eKLR.**

On the other hand, Ms Macharia, the prosecution counsel, submitted that the prosecution has proved this case to the required standard; that there are two eye witnesses who saw the accused hit the deceased on the head with a piece of wood and they positively identified the accused by electricity light at the scene; that the two witnesses also identified the accused at the identification parade; that the doctor confirmed cause of death as head injuries and that intention to cause the death of the deceased on the part of the accused has been proved. Ms Macharia urged the court to find the accused guilty and convict him accordingly.

In determining this case, I find the unlawful death of the deceased proved beyond reasonable doubt. Julius and Bernard who were present when the deceased was assaulted, told the court that the deceased was injured after he was hit on the head. William Ndege, PW1, and Patrick Ekesa Ouma, PW3, who saw the deceased at Kenyatta National Hospital, also saw head injuries on deceased’s head.

Emily Adhiambo Rogena, PW8, who performed the post mortem on the body of the deceased, confirmed these head injuries. Emily told the court that she was an associate professor in Human Pathology at the University of Nairobi and that she also undertook duties at Kenyatta National Hospital. Her evidence is captured thus:

“Externally, on the scalp was a large laceration on the right side 4cm running obliquely towards the centre of the head with associated abrasion. Internally, there was bruising underneath the scalp and on the skull was a C-shaped flap measuring 27cm stitched with nylon suggesting surgical treatment. There was a flap of bone measuring 5x4cm on the right side of the head. There was a fracture on the right side of the skull extending to the back and towards the base of the skull. On top of the brain on the right side was extradural haematoma. There was second bleeding inside the brain. In the second membrane of the brain was also bleeding. On the left lobe of the brain was bleeding on the opposite lobe.”

After extensive examination, Emily formed the opinion that the cause of death of the deceased was head injury with subdural, extradural and subarachnoid haemorrhage with right temporal bone and base of skull fractures due to blunt force trauma to the head. This evidence is consistent with the head injuries described by Julius and Bernard the two eye witnesses.

Having settled the issue of death of the deceased and its cause, I now turn to the twin issues whether the accused is the person who caused the injuries to the deceased that led to his death and whether he had formed the intention to kill the deceased. From the outset, I wish to disagree with Ms Ekin the defence counsel. Her view is that prosecution case is based on circumstantial evidence. She submitted on this issue and cited the **Solomon Kirimi M’Rukaria** and **Geoffrey Muli Kyalo** cases, above, to support this view. The evidence in this case in support of the prosecution case is direct evidence. There are two witnesses, Julius and Bernard, who were present at the scene and who placed the accused at the scene and saw him assaulting the deceased. The cases cited by the defence do not assist their case. The cases are based on circumstantial evidence and I wish to distinguish them from this case.

Julius and Bernard were at the scene. Generally, their evidence agree that on that fateful night, 28th April

2014 about 10.00pm, the deceased who was a guard at the bananas store at Muthurwa Market disagreed with one Kareti over some money (said to be Kshs 200). The deceased hit Kareti who ran away and returned shortly thereafter with a group of young men. Among the young men was the accused. The accused took a piece of firewood and hit the deceased on the head seriously injuring him. These two witnesses were to pick the accused from an identification parade mounted at Kamukunji Police Station on 20th May 2014. The accused admitted in cross examination that Julius, one of the eye witnesses, identified him at the identification parade. It is also worth noting that the evidence of PC Isaac Kiama, PW5, who conducted the identification parade, was not challenged in court.

Defence counsel did raise issue with contradictions and inconsistencies in the evidence of Julius and Bernard. I have analysed their evidence. Julius told the court that Kareti ran away after being hit by the deceased and came back after five (5) minutes with 10 young men. Bernard on the other hand told the court that Kareti came back after fifteen (15) minutes with five (5) young men. Other than this the two witnesses were in agreement that the accused was known to them before this incident although not by name. Both witnesses knew his physical features as they used to see him around Muthurwa. Both did not know what accused did for a living. Both said the accused hit the deceased three times (Bernard) and two-three times (Julius). Both said there was bright electricity light at the scene.

While I find some slight inconsistencies in their evidence I hold the view that these do not go to the root of the matter, that the accused picked a piece of wood and hit the deceased on the head causing him serious injuries from which he later died. The contradictions and inconsistencies noted do not negate the fact that among the young men who came back with Kareti it is only the accused who assaulted the deceased.

There is also another issue. Evidence does not agree whether the deceased lost consciousness immediately after he was assaulted or he was able to talk but was unable to talk after some time. Julius was categorical that the deceased was able to talk and gave him (Julius) contacts of his family members. Julius said the deceased was not able to talk after this. Bernard said the deceased could not talk after he fell. It is worth noting that Julius was 3 steps from where the accused was assaulting the deceased. I find that I have no reason to doubt this evidence that the deceased talked to Julius before he became serious to a state that he could not talk.

I wish to distinguish this case with the **Maureen Atieno Oduor** case above relied on by the defence to support the view that the prosecution evidence was riddled with inconsistencies. In that case the inconsistencies were irreconcilable. In the case before me, the inconsistencies are negligible and do not go to the root of the matter.

I have considered that the arresting officer CPL Duncan Musiku, PW7, told the court that the accused was described to him as a short man with dreadlocks. CPL Duncan told the court that he knew the person who was described to him as he had arrested the same person many times previously. The officer told the court that at the time the accused spotted dreadlocks. This evidence was not challenged. This description led to the arrest of the accused. I find that the identity of the person arrested was confirmed by Julius and Bernard the identification parade where both witnesses picked the accused.

Having considered the evidence in detail, it is my view and I so find, that the accused was properly and positively identified as the person who inflicted fatal wounds on the deceased. This element of the offence is proved beyond reasonable doubt.

Finally, on the issue of malice aforethought, I have considered the serious injuries inflicted on the deceased. The head injuries were extensive and included a fractured skull. This, in my considered view, is indicative of the force applied by the accused against the deceased. Malice aforethought is defined under section 206 of the Penal Code to include the intention to cause the death of or to cause grievous harm to the deceased. In my view, one does not hit another three times on the head with a piece of wood or any other weapon without intending to at least cause grievous harm to that person. I have also considered that the accused was not the person who had disagreed with the deceased so the accused's actions are unjustified to say the least. In my view the accused acted out of malice. I find the element of malice

aforethought proved beyond reasonable doubt.

Having found all the ingredients of murder proved beyond reasonable doubt, I hereby reject the defence of the accused. He was placed at the scene. He admitted being in the vicinity although he denies involvement. He admitted having been identified by Julius at the identification parade. It cannot therefore be true, in my view, that the police arrested him after he failed to give them a bribe of Kshs 2,000. His action of disappearing from the scene until the “dust settled” also points to his guilt mind. I consequently find the accused guilty of the murder of Bernard Otoro and enter conviction against him. Orders shall issue accordingly.

Dated, signed and delivered this 12th day of May 2016.

S. N. MUTUKU

JUDGE

In the presence of:

Ms Esther Macharia, prosecution counsel

Ms J. Ekin, defence counsel

Mr. Geoffrey Amiani Lumira, the accused

Mr. Daniel Ngumbi, court clerk