



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 9 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

FAZUL SWALEH OKOTH ALIAS MAGWAYA.....ACCUSED

JUDGEMENT

Fazul Swaleh Okoth alias Magwaya, the accused, is charged with murder contrary to section 203 as read with section 204 of the Penal Code. Particulars of the offence show that on 28th October 2015 at about 4pm at Kenya Cinema along Moi Avenue within Nairobi County jointly with another not before the court murdered Hassan Lokorachi (the deceased).

Both the accused and the deceased were parking boys operating around Kenya Cinema area on Moi Avenue Nairobi. They were not the only parking boys around that area. There were others too including Collins Otieno, PW2, Benson Kamau Njoroge, PW6, Kelvin Onyango, PW8, Zachary Obayo Otieno, PW9 and one Anthony Ouma Onyango alias Toshi, a suspect at large. Evidence shows that a disagreement arose between the deceased, the accused and Anthony Onyango over parking of cars. A fight ensued between the three of them with the accused and Anthony on one side against the deceased. The fight was described by witnesses as the one that went on for a long time with breaks in between. As a result of the fight the deceased was seriously injured. He was taken to Kenyatta National Hospital where he died while undergoing treatment. The accused was thereafter arrested and charged. Anthony is at large.

In his defence the accused denied assaulting or taking part in assaulting the deceased and told the court that he was informed that the deceased had been assaulted by Anthony. He told the court that Anthony was his friend and that he was sent to Anthony by other parking boys to tell him to go and visit the deceased in hospital; that he told Anthony but Anthony shouted at him and failed to go; that he was arrested after he failed to identify where Anthony was.

The prosecution bears the burden of proving that the offence of murder was committed by providing evidence to prove beyond reasonable doubt that Hassan Lokorachi died as a result of an act committed or omission done by the accused person before the court and that the accused in so doing acted with malice aforethought.

At the close of the case, the prosecution submitted that the accused and Anthony Onyango had formed a common intention to prosecute an unlawful purpose; that section 20(1) of the Penal Code provides parties to an offence and that the accused person fits in this category of offenders. The prosecution submitted that it has proved beyond reasonable doubt that the offence of murder was committed by the accused person and urged this court to so find and convict the accused person.

On the other hand the defence submitted that the prosecution has not discharged its mandate of proving

this case beyond reasonable doubt. It was submitted that the evidence by the prosecution is full of contradictions, is inconsistent and leaves many gaps and therefore it cannot support a conviction. Counsel for the accused Mr. Ogada discredited the evidence of the prosecution witnesses and identified the contradictions and inconsistencies in that evidence. He submitted that the witnesses were not truthful and were making an effort to implicate the accused.

Mr. Ogada further submitted that the case was poorly investigated and that the investigations were incomplete in that the investigating officer did not trace Anthony to arrest him nor collect the bloodstained boots allegedly worn by the accused. He submitted that the eyewitnesses were untruthful; that the prosecution case raises serious doubts as to what exactly happened; that the contradictions and inconsistencies are so serious and so material that they cannot be considered minor and cannot therefore be resolved in any other way other than acquitting the accused and he urged the court to so acquit the accused person.

In my determination of this matter, I have considered all the evidence and submissions by both counsels. That the deceased died is not in dispute. According to the evidence of Dr. Andrew Kanyi Gachie, (PW7) a pathologist based at Kenyatta National Hospital, the deceased had an external right frontal injury indicated as an abrasion measuring 9 by 4 centimetres. Internally, the deceased had no injuries save for evidence of pneumonia which according to the doctor may have been acquired at the hospital. The head had massive bleed at the base of the brain medically known as subarachnoid. There were no fractures noted on the skull. The doctor formed the opinion that the cause of death was head injury due to blunt force trauma. The findings of the doctor are captured in the post mortem report produced in court as an exhibit (Exhibit 1).

I have noted that the defence counsel took issue with the post mortem report for bearing two names of doctors claiming that Dr. Gachie did not conduct the post mortem examination on the body of the deceased and that it was Dr. Ayara who did so. This was clarified by Dr. Gachie that Dr. Ayara was a student under his watch during post mortem examination and he did not conduct it. I have considered this issue and I am satisfied with the explanation offered by Dr. Gachie. I have no reason to doubt the authenticity of the post mortem report. The findings of the doctor have confirmed the death of the deceased and I find the fact of death proved beyond reasonable doubt.

The next issues of who caused that death and whether that death was intentionally caused shall be considered together. Ten (10) witnesses have testified for the prosecution. Out of these witnesses eight (8) were at the scene. Their evidence has been discredited by the defence counsel who has criticized it as not worth of proving this case beyond reasonable doubt. I think it makes sense to give a brief summary of what each witness told the court.

Jason Awinja Nyamwanda (PW1) was vending scratch cards (airtime cards) near Kenya Cinema on Moi Avenue. He told the court that at 3.00pm he saw the accused in company of one Toshi (Anthony) start fighting the deceased over money paid to them after assisting cars to park. Jason said he was far from the fighting trio. On cross examination he said fighting started at 2.00pm but got serious at 4.00pm. He said the fighting started between the deceased and Toshi and then the accused joined in the fight. He was taken to task over the contradictions in his evidence and statement to the police as to who, between Toshi and accused had a bottle. He clarified that he did not observe well who had the bottle. He also said he left the scene at 7.00pm and that at that time the fighting was still on.

Collins Otieno Jura (PW2) said he arrived at the Kenya Cinema area and found the accused, Anthony and the deceased fighting. He said the fight started at 11.00am and again at 4.00pm. He said on cross examination that the fight was near Family Bank and that he was far and could not see well. He said Anthony hit the deceased with a metal bar on the head and accused stepped on him with boots.

Louis Kiragu Waithera (PW3) who was in the company of Denis Adera Otieno (PW4) and James Muthike (PW5) told the court that the three of them went to have lunch at 12.00pm and on returning they found the deceased, accused and Anthony fighting; that the three were drunk and were arguing and fighting intermittently. On cross examination he said that fighting did not start before 3.00pm but the trio

had been arguing before the fight broke out.

Denis on his part does not mention any fighting. He said that when they arrived at the scene from lunch he saw the accused and Anthony standing and that he saw the accused wiping blood from his white gum boots and deceased lying on the pavement. He said he did not witness the fighting. James said he has left the accused, Anthony and deceased arguing and that on returning he saw the accused wiping blood from his gum boots and Anthony dragging the deceased towards under the vehicles. The three witnesses did not agree on the time they left for lunch but James and Denis said they went to eat around 3.00 and 3.30pm.

Benson Kamau Njoroge (PW6) testified that he saw the accused and Anthony hold the deceased and hit him against the wall. He puts the time at 6.00pm. While Kelvin Onyango (PW8) said that he was at the scene but left at 2.00pm witnesses Anthony and the deceased arguing and fighting. On cross examination he said that by the time he left only Anthony and the deceased had been fighting. On re-examination he said he did not know what happened after he left.

Zachary Obayo Otieno (PW9) testified that Anthony and the accused sent the deceased to buy alcohol which they all consumed and started arguing over parking of vehicles. He said the accused and the deceased started fighting and that Anthony joined in the fight. He said the fighting was intermittent and that around 4.00pm Anthony pushed the deceased who fell and hit his head on the pavement; that the accused ran and stepped on the deceased with his gum boots while Anthony used a bottle to hit the deceased on his head.

I have carefully analysed this evidence. It contains contradictions on the exact time the fighting took place and what each witness observed in regard to the injuries sustained by the deceased. These contradictions have been highlighted by the defence counsel. I understand the evidence of majority of the witnesses to mean that the arguments and the fighting were intermittent and took over a long period of time. Although the exact amount of time it took is not clear, I have no reason to doubt the different accounts given by the witnesses. I find that all the witnesses mentioned the presence of the accused and the deceased at the scene. They also mentioned one Anthony who is said to be a suspect at large. Witnesses also mentioned arguments and fighting between the trio of the accused, Anthony and the deceased with the only difference being that some witnesses could not tell exactly what happened. I find one common thread running through majority of the witnesses' evidence that at the end of the arguments, quarrels and fighting between the trio, the deceased lay on the pavement injured and bleeding. The deceased died later in hospital of injuries that are consistent with head injuries.

I have noted that Collins said Anthony hit the deceased on the head with a metal. Zachary said Anthony used a bottle to hit deceased on the head. Collins said he was near Kenya Cinema while the fighting was near Family Bank. Defence Counsel raised issue with this in his submissions. This court did not benefit from evidence showing how far from each other these places are.

I find that I have no doubt in my mind that the accused before me was at the scene. All the witnesses who were at the scene place him there. They also place one Anthony Ouma Onyango at the scene. Although there are contradictions noted in evidence in respect to the time this fighting took place or who between Anthony and the accused caused the injuries from which the deceased died, it is my finding that evidence agrees that the fighting was between the three of them, the accused, the deceased and Anthony. Evidence agrees that the deceased was injured as a result of that fighting and later died in hospital of injuries consistent with those caused by a blunt force trauma. This in my view could have been as a result of falling on the pavement after being pushed, or having been hit with an object which is described by Collins as a piece of metal or a bottle according to Zachary.

The accused has no legal duty to prove his innocence but having analysed his unsworn defence I find that he was talking about events of 20th November 2015. He said he learned of deceased's assault by Anthony the following day when he reported to work. This obviously cannot be true. All the witnesses placed him at the scene on 28th November 2015.

I have taken into account all the evidence and the inconsistencies. I have taken into account that the fighting took time and was intermittent. I am aware that all the witnesses in such circumstances could not have observed the same events unfolding as though it was an event that took place over a short period of time. I have taken into account that these witnesses were either parking boys: PW2, PW6, PW8 and PW9, or hawkers: PW3, PW4 and PW5. I am therefore aware that over the period the fighting took place in that intermittent manner, these witnesses were busy doing their work or either parking or hawking. They could not have been stationary observing what was happening. Zachary seems to have observed more than the other witnesses and I find his evidence corroborating that of the other witnesses. I have also considered that all the witnesses could not describe what clothes the accused wore on that day but said that he wore white gum boots. This does not mean, in my view that they were mistaken in everything they told the court.

In resolving the issue as to who caused the injuries that led to the death of the deceased, it is my finding that there is sufficient evidence to show that the accused took part in the fight between the deceased, Anthony and himself. They were two against one and they overpowered him causing him fatal injuries as a result of that fighting.

On the issue of malice aforethought, I have taken into account that the fight was between the three of them. I harbour doubts that the intention of the accused in participating in that fight was to kill the deceased. I think it is an act of fighting went out of control. Evidence shows that the three of them were drunk although this court has no evidence to confirm the state of intoxication and whether this affected accused's mental capacity to make rational decisions. Therefore, due to the lack of evidence proving malice aforethought, it is my finding that the offence of murder has not been proved beyond reasonable doubt. I will and do hereby acquit the accused of the offence of murder. I however find the offence of manslaughter proved beyond reasonable doubt. In that regard, I find the accused guilty of the offence of manslaughter and convict him forthwith. Orders shall issue accordingly.

Dated, signed and delivered this 7th day of November 2016.

S. N. Mutuku

Judge

In the presence of:

Ms Nduati for the prosecution

Mr. Ogada for the accused person

Fazul Swale Okoth, the accused person

Daniel Ngumbi, court clerk