



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 12 OF 2014

LESIIT, J

REPUBLIC.....PROSECUTOR

-VERSUS -

BYRON ROBERT OTIENO.....ACCUSED

JUDGMENT

1. The accused **BYRON ROBERT OTIENO** is charged with one count of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence are:

BYRON ROBERT OTIENO on the 9th day of May 2013 at Kariobangi North, in Kasarani district within Nairobi County, murdered DENNIS NJENGA WAMBUI.

2. The prosecution called six witnesses. The brief facts of the prosecution case were that the deceased and Silas, PW2 were going to look for a person to repair Silas cellphone when they met with the accused. PW2 who had not met the accused before heard him asking for a bag from the deceased. When the deceased said he did not have, PW2 testified that he saw the accused remove a knife from his waist, stab the deceased in the chest. PW2 then saw the accused walk back to where he came from.

3. PW2 stated that he ran away on seeing this.

4. PW3, mother of deceased said that she saw her son return home with his mouth full of blood. He then told her that Byi had stabbed him. PW3 said she knew Byi was the accused whom she had met 2 months earlier, as a friend of the deceased. The deceased died before he could receive any treatment.

5. PW4 arrested the accused on the 7th January 2014 along Racecourse Road while on spive duties with 2 colleagues. The accused was identified to them by a person not called as a witness, as one wanted for a murder charge committed seven months before. PW6 who investigated the case received the accused from Kamukunji police station and charged him with this offence.

6. According to the doctor PW5, the deceased died due to hemorrhage due to chest injury due to a penetrating stab wound. The doctor stated that the weapon used was a long sharp pointed weapon and that it penetrated the chest perforating the left lung and causing excessive bleeding which caused death.

7. The accused was placed on his defence. He put forward self-defence as his defence. He stated that he was coming from practice carrying his boots in a paper bag when the deceased and one Silas approached him. The accused stated that he had borrowed 1000/= from the deceased but had not been able to refund

the debt because the vehicle in which he worked as a conductor was in the garage. The accused said that the deceased was displeased with the delay to repay the debt and had said he could not tolerate the delay.

8. The accused stated that when he told the deceased that he still did not have the money, the deceased pulled out a knife from his waist and aimed at him. The accused said he held the deceased's hand which had the knife and that in the struggle the accused was stabbed on the hand. He showed a 1 ½ inch scar. The accused said that after struggling for control of the knife, he was able to overpower the deceased and directed the knife to point at the deceased and stabbed him on the chest.

9. The accused said that after the incident, he continued working as usual until 17th January 2014 when he was arrested. In cross-examination the accused said he learnt of the death of the deceased the next day after the incident but did not go to police because he was afraid.

10. The accused faces a charge of murder. The prosecution has the burden to prove the charge beyond any reasonable doubt. Murder is prescribed under **Section 203 of Penal Code** as follows:

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

11. The prosecution must prove that the accused stabbed the deceased and that it was the stab injury which led to the deceased death. The prosecution must prove that at the time the accused stabbed the deceased the accused had formed the necessary malice aforethought to either cause death or grievous harm to the deceased.

12. I have carefully considered the evidence adduced by both the prosecution and the defence in this case. I have also considered the submissions made herein.

13. There are certain facts which are not in dispute. There is no dispute that the accused stabbed the deceased and that death was a direct result of the injuries the deceased sustained in that act. There is also no dispute that the accused learnt of the deceased death one day after the incident. There is no dispute that the accused did not report to the police at any time following this incident. There is no dispute that the accused was arrested seven months after the incident in a street within Nairobi city centre.

14. The areas of dispute are who between the accused and the deceased had the knife which was used to stab the deceased and secondly who attacked the other first.

15. The prosecution had a single eye witness PW2. His evidence is clear and simple. PW2 stated that he was with the deceased when he requested the deceased to escort him (PW2) to take his phone to a person to repair it. PW2 testified that they chose to use a field as a short cut on their way back home after they failed to find the repairer.

16. PW2 stated that as they crossed the field to go back home, he saw the accused approaching them. PW2 stated that the accused ordered them to stop and they did. PW2 then heard the accused ask the deceased for a bag and the deceased replied that he did not have it. PW2 said that he saw the accused reach for a knife from his waist, stab the deceased once in his chest. PW2 said that he saw the accused walk back to the place he had come from.

17. In the accused defence, he stated that he was carrying his boots in a paper bag walking through a field when he met with the deceased and PW2. The accused stated that the deceased demanded a refund of money he had lent to him and that when he told the deceased he did not have any money, the deceased produced a knife from his pocket and aimed it at him. The accused stated that he grabbed deceased by the hand which was holding the knife, overpowered him, directed the knife to his chest and stabbed him.

18. PW2 testified before me as did the accused. PW2 was a young man much younger than the accused and also timid. I examined his demeanour and was impressed that he was a truthful witness who was worthy of belief. I believed his testimony.

19. PW2 said that he did not know the accused before that date. The accused admitted in his defence that he met PW2 for the first time on the day of this incident. I find that there was no grudge between PW2 and the accused. There was no reason that could have led PW2 to fabricate this case against the accused.

20. I believe the evidence of PW2 that the accused was the one who had the knife in his possession. I also believe PW2's evidence that there was no struggle at all but that the accused pulled out his knife from his waist, stabbed the deceased and returned back to where he had been before the attack.

21. The accused made an admission before the court that he stabbed the deceased after overpowering him. Under **Section 25A** of the **Evidence Act** that admission, which tended to the proof of guilt is admissible and can be taken into consideration as part of the evidence before court. **Section 25A** provides:

“25A. Confessions generally inadmissible.

(1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such

person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person's choice.

(2) The Attorney-General shall in consultation with the Law Society of Kenya, Kenya National Commission on Human Rights and other suitable bodies make

rules governing the making of a confession in all instances where the confession is not made in court.”

22. Considering the evidence of PW2 and accused own admission, I find that the accused stabbed the deceased once in the chest. The evidence of PW2 and the admission by the accused are in tandem with the deceased dying declaration to his mother PW3 that it was the accused who stabbed him.

23. I find that the accused carefully chose where to stab the deceased, just on the side of his heart. Indeed the stab was so serious that the deceased did not make it to hospital. I find that even though it was simple stab, it was a well calculated one intended to cause either death or grievous harm to the deceased.

24. I find that the prosecution has established malice aforethought having shown that the accused had armed himself prior to the attack and that he stabbed the deceased in a manner calculated to cause death or grievous harm. **Section 206 (a)** of the **Penal Code** was therefore met.

25. I considered the other facts of this case which accused did not deny. He did not deny that he never went to the police ever after learning of the death of the deceased and that it was seven months later that police arrested him. Those facts taken together with circumstances of the arrest as given by PW4 paint an clear picture of a person who had been hiding after the incident. According to PW4, the accused denied his name and resisted arrest by being very violent when he was informed that he was under arrest for investigations into an offence.

26. The accused conduct of leaving the vicinity of this incident for 7 months without reporting to the police, and his attempt to escape arrest by resisting violently all point to a conduct of a person with a guilty record.

27. I find that the deceased did not demand any money from the accused and that the deceased had no motive to attack the accused. I find that it was the accused who had a motive to harm the deceased because of a bag he wanted from the deceased which he was not given. Furthermore the accused had the knife in his possession before the attack and deceased had no chance to resist the attack.

28. I find that the defence of self-defence which the accused put forward is not available to the accused in all the circumstances of this case.

29. I am satisfied that the prosecution have proved that the accused stabbed the deceased causing him severe injuries as a result of which he succumbed and died. I find the accused guilty of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** and convict him under **Section 322** of the **Criminal Procedure Code**.

Dated 4th day of June, 2015.

LESIIT, J

JUDGE