



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL CASE NO. 13 OF 1993

REPUBLIC.....STATE

VERSUS

1. PETER AYANGA MWENDWA.....1ST ACCUSED
2. J.N.....2ND ACCUSED
3. FRANCIS OMENTA.....3RD ACCUSED

JUDGMENT

The first accused Peter Ayanga, 2nd accused Joseph Nateng with another Francis Omenta now deceased were jointly charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. In that on 12th day of April, 1992 at Nandi Hills Farm Company Ltd, Songhor in Nandi district of the Rift Valley province jointly murdered Lokirchan Kula.

The facts of what transpired on the material day is derived from the evidence of PW1, 2 and the statement of 1st accused. PW1 stated that all accused 1, 3 now deceased and the deceased subject of these proceedings were employees of PW6 and her husband. They stayed in a camp. The 1st accused resided in one house as 3rd accused now deceased

PW1 also resided in the same camp.

He recalled that that evening the deceased went to the house of 1st accused and another and inquired about maize seeds which were therein. The 1st accused replied that they belonged to a herdsman. The deceased was not satisfied with that answer and insisted on wanting to know where the maize seeds had come from. The 3rd accused now (deceased) pushed the deceased out of their house. When the two got out a fight ensued between them. The then 3rd accused slapped deceased 3 times and deceased slapped him 4 times. Accused came out with a *panga* cut the deceased once on the stomach and back and deceased fell down and accused 1 ran away.

The 2nd accused who was a step son of the deceased was not around when the fight started. Accused 2 resided with deceased in one house as deceased was married to his mother or he was cohabiting with his mother.

According to PW1 when accused 2 came he found deceased already lying on the ground and he picked a stone and threw it at his head. The 2nd stone missed. People screamed and crowded together.

Further evidence is from PW2 who is sister to accused 2 step daughter to the deceased. This witness was declared hostile and not much evidential value can be attached to her testimony. Her testimony differed with that of PW1 while PW1 had stated that accused 1 cut deceased with sharp side of the *panga* both on the stomach and the back and blood oozed PW2 stated that accused one hit deceased with flat side of the *panga* and no blood came out. Further contradicted evidence of PW1 that the stone used to his deceased by accused 2 was of mud not like the hard stone produced in Court and also that when deceased was hit with the mud stone he was already dead as he was motionless.

Further evidence is from PW2 and 3 both who state that accused 2 was not present during the fight. According to PW2 when she was chased away by accused 1, accused 2 was still at the shop he had not come. According to PW3 mother of accused 2 she had been with accused 2 at a harambee and when she heard screams she came to the scene and found deceased lying down already injured. The accused 2 was still at the shop.

After screams were raised people gathered at the scene among them PW4 husband and PW6 wife the couple who had employed both accuseds and deceased. The matter was reported to police and PW5 among other police officers visited the scene. They recovered the body of the deceased and arrested accused 3 now deceased who was at the scene. 1st accused had run away. Accused 2 was at the scene and he was also mentioned. Police took him away. Meanwhile accused 1 had run away. The next day PW7 was in a *matatu* with blood stained clothes. PW7 was aware of an incident which had happened in his village whereby one person had fought with

another and one person had died. The accused I looked worried and PW7 decided to take him to police station.

Accused 1 was later handed to Kapsabet Police Station where all the 3 were charged with this offence. The 3rd accused died while awaiting trial.

The first accused in his unsworn evidence stated that on the material day he was preparing food in his house when the deceased came and inquired about a little seed maize which was in the house. The first accused tried to explain but the deceased did not accept the explanation given. The deceased went to his house and armed himself with a *panga* and *jembe* (hoe) handle and a shoe and came back towards them. He started beating accused 1 and a struggle ensued. They went outside the house and accused I freed himself and ran away into the bush. While in his hiding place he heard screams and learnt that people were fighting.

He was afraid and did not go back to house. He slept in the bush and next day he boarded a *matatu* to go home but he was arrested on the way.

The 2nd accused also gave unsworn evidence alleging that on the material day and at the material time he was away in the garden when he heard screams. He started coming home and met wife of their employer PW6 who told him people were fighting. He arrived at the scene and found when deceased had already died. The employee reported to police and police came to the scene took the body and 3rd accused.

Afterwards after police had made inquiries police questioned him and as it had been alleged that he - accused had hit the deceased with a stone. He accused 2 denied but police went with him.

In his submission to the assessors counsel for the State submitted that there was a fight between accused 1 and deceased during which fight accused 1 hit deceased with a *panga*. That in the circumstances accused 1 had no intention to kill and he is guilty of the offence of manslaughter.

As for 2nd accused he arrived at the scene after the fight and found deceased lying down and he picked a stone and hit him. That this shows that accused 2 had a grudge with the deceased and picked on this opportunity to kill the deceased.

The defence counsel on the other hand submitted that the accused have

raised an alibi to the effect that they did not assault the deceased and this alibi has not been displaced by the prosecution case and urged the assessors to return a verdict of not guilty. More so when evidence on the record is contradictory.

The assessors returned a verdict of not guilty for accused 2 and guilty for manslaughter for accused 1.

The section under which accuseds are charged defines murder as killing with malice aforethought which depicts intentional killing.

From the facts of the case we have no evidence of an intention to kill on that part of the first accused. The agreed facts from evidence of PW1, and PW2 who was declared hostile is that there was a fight between deceased, accused 1 and the then 3rd accused who died while awaiting trial. The first accused in his statement under charge and caution stated that he fought with deceased and cut deceased with deceased's own *panga*, exhibit 3. Exhibit 3 has objected to and it was produced in evidence after trial within a trial. The general rule regarding a retracted statement is that before it is acted upon there has to be corroboration.

We have corroboration from the evidence of PW1 who was an eye witness who stated that there was a fight. Further corroboration is from PW7 who arrested accused the next day who stated accused had blood stained clothes and injuries. The P3 exhibit 6 in respect of the 1st accused indicates that accused when examined was found to have suffered a laceration wound at the occipital region caused by a sharp / blunt object. From the foregoing the Court is satisfied that there is sufficient evidence to corroborate 1st accused's statement that there was a fight. The accused had set up an alibi and the general rule regarding an alibi is that it must be considered against the totality of the prosecution evidence.

When so considered I find that PW1's evidence who was an eye witness and he was not shaken on cross-examination, PW2s' evidence although she was declared hostile, PW7's evidence who arrested 1st accused while escaping from the scene and medical evidence. In exhibit 6 displaces the alibi of first accused. He 1st accused was an employee of PW4 and 6 who both confirm there was a fight involving their employees in their employees camp.

Accused 1 had not been given permission to go off. He disappeared after the fight and he was arrested while running away to his home area. The conduct of first accused further corroborates his charge and cautionary

statement because if he had not done anything wrong he could not have run away. I therefore find that the evidence in support of the prosecution has displaced the 1st accused's alibi.

As for second accused the evidence is that of a single witness PW1. He was at the scene when he saw accused 2 pick a stone and hit the deceased on the left side of the head. He PW1 identified the stone in Court. PW1 further added that accused 2 and deceased used to quarrel and threaten each other. Basing on this evidence the State submitted that since accused 2 was not involved in the fight he had no reason to hit deceased with a stone and that there must have been a grudge. Accused 2, PW2 and 3 and deceased lived in one house. The two PW2 and 3 said there was no problem between accused 2 and deceased. PW1 did not live with them in one house although they resided in one camp. In the circumstances I find that evidence of a grudge is not proved.

The question now is whether accused indeed hit the deceased with a stone on the head. PW1 has said so and confirmed the same in cross – examination.

It has not been suggested that he PW1 had any reason to tell lies about the accused. His evidence was contradicted by PW2 and 3 who were related to accused 2 by virtue of being a sister and mother. Being related the two had every reason to shield accused 2 from the offence and I have no doubts that is why PW2 stated the he – accused 2 hit deceased with a mud stone not the one produced in Court. She turned hostile and she was declared hostile by the State and as such her evidence cannot be considered to be of any substance and the same is unreliable. As for PW3 it is on record that she arrived at the scene after the

incident had taken place and she is not in a position to know what happened.

The Court is therefore left with evidence of a single witness which has to be weighed against the 2nd accused's alibi. When weighed the Court finds that PW1 knew accused's 2 before it was still day time and the fight had ended. The crowd was just assembling and as such the view was not obstructed. I find that there was positive identification of accused 2.

PW1's evidence is further given weight by the post mortem report exhibit 7 in which the doctor noted that the deceased's skull was deformed especially at the left side. PW1 stated deceased was hit on the head on the left side. According to the doctors findings although the body had greatly decomposed the cause of death was severe head injury.

The general rule regarding single witness evidence is that the Court has to warn itself against acting on such evidence in the absence of corroboration and before acting on the same Court must be satisfied that the same is water tight.

I hereby warn myself accordingly and state that since identification was positive as it was day time and there was no grudge between accused 2 and PW1 there is no reason as to why he should tell lie about him. Further that the location of the place where injury was inflicted as per evidence of PW1 was confirmed by the doctor during post moterm. Further that PW2 played down the nature and size of the stone used to hit deceased in order to shield her brother from blame. Weighing her evidence with that of PW1 that of PW1 is more credible.

Hers carry no weight as she was declared hostile and her evidence cannot be taken to be contradicting that of PW1 at all. PW1's evidence is therefore unchallenged reliable and safe to find a conviction.

The Court is satisfied that 2nd accused inflicted the injury complained of on the deceased which contributed to his death for reasons best known to him. Since the motive is not known it cannot be said for sure that it was intentional and this leads to the bout being resolved in favour of accused 2 on the charge of murder and gives way to conclusion of unlawful killing.

The Court has thus differed with the assessors. The reason for this is that the assessors did not consider the weight to be attached to PW1's evidence, did not consider the fact that PW2 and PW3 were trying to shield accused 2 who was related to them and that is why PW2 contradicted her statement to police which led to her being declared hostile, did not consider PW1's evidence as to the location of injury caused by accused 2 in the light of the medical report exhibit 7. Had the assessors considered the above factors they could have arrived at the same conclusion as the Court.

After assessing all the evidence on the record adduced by both parties and reasons given I am satisfied beyond doubt that both accused 1 and 2 separately inflicted the injuries which later resulted into the death of the deceased. The evidence on intentional killing is lacking and therefore the two unintentionally killed the deceased.

The offence disclosed is one of manslaughter c/s 202 as read with section 205 of the Penal Code.

The first accused is found guilty of the substituted charge and convicted accordingly.

The second accused who was 17 years at the time of the commission of the offence the Court makes a finding of guilty in his report for the substituted offence of manslaughter.

Dated and Delivered at Eldoret this 12th day of August 1994.

R.N. NAMBUYE

JUDGE

