



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL CASE NO.18 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

WILLIAM KEMBOI YEGO.....ACCUSED

JUDGEMENT

1. The accused was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal code. The particulars of the charge were that on the 24th May 2015 at 4.30 am outside Places pub in Kitale town within Transzoia county murdered ALBERT WAFULA.

2. The accused denied the charge and the prosecution called two witnesses to establish its case. The summary of the evidence as presented is as hereunder.

3. **PW1 DR FAUSTINE SHITOTE** produced the post-mortem report on behalf of Dr. Odhiambo who carried out. He found that there was penetrating wound on the head and concluded the cause of death to be severe head injury.

4. **PW2 SAMMY WAIGANJO NDUATI** testified that on the 23rd May 2015 he came to Kitale town to purchase some household items. He was with the deceased and they decided to go and see his friend who was a *bouncer* at Places pub as they wanted to start a gym business.

5. He said that they had drinks till 2am when they decided to leave and they found someone with a white vehicle reversing out of Total petrol station. In the process of reversing he hit a motorcycle and the driver walked out very annoyed and confronted the motorcyclist. A confrontation ensued between him and the deceased and the accused who was wielding a knife threatened him but people intervened.

6. As he reversed out he hit a taxi and people intervened and in the process he hit the deceased on the head using a spanner and he felt down. People then smashed the vehicle and they took the deceased to the hospital. He put the wheel spanner in his vehicle and left with it. He said that the incident took about 30 minutes and there was light from the parking area.

7. He said that the deceased was a person he knew for over one year as he used to drink there. He took the deceased to the hospital and police came to the hospital as well. The accused was arrested the following day. He said also that the accused was with a lady that night who tried calming him in vain.

8. When cross examined he said that he drunk a brand of alcohol called *Quarana* as from 7am when they arrived. He said that he knew the accused although in his statement he said that he came to know his name later. He also said that there were many boda boda persons as there was a commotion. He said that the spanner produced did not have a serial number.

9. When placed on his defence the accused gave unsworn evidence denying the charge. He said that on the 23rd May 2015 they had

a birthday of his friend and they celebrated from 7pm to 3am. As he left for home he reversed onto a motorcycle which was parked behind him and as he went to check a person began fighting him. A fight arose between boda boda fellows and vehicle owners.

10. In the process he was injured and went to report at the station and he was told to go back the following day when he learned that someone had died. He was shown the spanner used to injure the deceased but he denied that it was his.

11. The accused did not call any witness and he closed his case.

12. The court directed the parties to file written submissions which they have complied. The learned state counsel on his part submitted that all the ingredients of murder had been established.

13. He said that there was malice aforethought on the part of the accused as was proved by the production of the spanner as an exhibit. He submitted that the accused knew the consequences of his action, namely that it was going to injure the deceased.

14. The defence counsel submitted strongly that the state had not proved sufficiently its case. He said that essential witnesses were not called and that a proper identification was lacking. He said that an identification parade was not conducted as the ability of the witness to identify or recognise the assailant had been compromised by his drunken mood.

ANALYSIS AND DETERMINATION.

15. It is apparent that for one to be convicted of the offence herein malice aforethought must be proved. It must be proved that the accused caused the deceased death through some unlawful act or omission and that such act was done unlawfully.

16. In the case at hand the star witness was the pw2. He said that they had been drinking at the pub from 7pm till 3am. He said that as they came out the accused who was reversing hit a motorbike and efforts to calm him were fruitless. According to him the accused removed a knife and threatened them.

17. He went on to state that;

“he removed the knife and threatened us. He began pulling each other with the deceased at the flower bed. People intervened and he threw the knife and went back to the car.”

18. As he reversed again he hit a taxi and people intervened and they quarrelled again with the deceased. He hit the deceased using a spanner.

19. The issue here is whether in light of the post mortem report by pw1 the spanner could cause such deep penetration of 1.5 cm. *vis a vis* the wound from a knife. PW2 said that the accused threw the knife and went back to the car. Where did he throw it and why was it not found"

20. The issue surrounding the weapon used is important as the accused denied that the spanner was his. In the absence of the investigating officer producing the spanner or any other murder weapon it is difficult to believe that the spanner belonged to the accused.

21. At any rate there are many other spanners all over looking similar and without any proper identification it is not farfetched to doubt whether it really belonged to the accused or was collected at the scene.

22. Then there is the question of identification. It is no doubt that the incident must have caused a scene. The light which enabled the witness to see the incident was not sufficiently explained or described for that matter. It is obviously not enough to state that there was light from the parking area. How strong was it *vis a vis* the lighting area"

23. This is important taking into consideration that there were motorbikes as well as taxis in the area. More importantly the incident took place at the wee hours of the morning.

24. The court further agrees with the submissions by the defence concerning the identification. There is no doubt that the witness had been drinking from 7 pm to 3am. However weak the alcohol content of *Quarana* was, to drink for about 7 hours must cause one to be drunk. That will inhibit his ability to recognise or identify someone. This is very crucial taking into consideration the fact that there was no any other eye witness.

25. This was well explained in the case of **GICHOI VERSES REPUBLIC (1990) e KLR** where the learned judge stated as follows’;

“In the courts view it is possible that the two complainants, though convincing, were mistaken due to admitted intoxication. There was no sufficient light at the scene to aid easy and faultless identification. Though recognition might be more reliable than identification of a stranger, the court should nevertheless remind itself that mistakes in recognition of close relatives and friends, have been made.”

26. Further in the absence of key witnesses who may have seen the incident, who made the report at the police" Who took the wheel spanner to the police station" There ought to have been other key witnesses who saw the incident taking into consideration the fact that the incident occurred at such wee hours of the night and the only identifying witness pw2 was already drunk.

27. The upshot of this is that the accused should be given a benefit of doubt. Although his defence was unsworn the same was plausible in the circumstances. He said for example that his vehicle was damaged a fact which was well admitted or mentioned by pw2.

28. In the premises, the accused is hereby set free under the provisions of **Section 215 of the Criminal Procedure Code** unless otherwise held. The sureties are also discharged.

29. **Orders accordingly.**

DELIVERED, SIGNED AND DATED AT KITALE THIS 11TH DAY OF DECEMBER 2020.

H K CHEMITEI

JUDGE



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