



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

HIGH COURT CRIMINAL CASE NO. 15 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

JUMA MWARABU CHAI ALIAS JUMA KAZUNGU....1ST ACCUSED

RAPHAEL MAITHA KAZUNGU.....2ND ACCUSED

CORAM: Hon. Justice R. Nyakundi

Mr. Mwangi for the State

Mr. Obaga for the accused person

J U D G M E N T

The two accused persons are charged jointly with the offence of murder Under section 203 and 204 of the Penal Code.

The particulars of the offence are that on 15.8.2017 at Kibaoni village, jointly with others not before court unlawfully murdered **Nyambu Shoka**. Each of the accused pleaded not guilty to the said charge faced. Counsel **Mr. Obaga** represented the accused while the prosecution was considered by **Mr. Alenga** Senior Prosecution Counsel.

What evidence did the state provide to prove the charge against the accused persons. The fundamental evidence which came from six the witnesses as their brief summary herein under outlines:

PW1 – Bahati Mbitsi testified and drew the court’s attention that on 15.8.2017 while in the forest he was called back home where he had a conversation with the deceased in respect of the sale of land to **Mr. Mwarunga**. On his return from **Mr. Mwarunga’s** home it emerged that one **Kache Nyambu** their sister had a sick child admitted at Kilifi Hospital. It was then agreed with the deceased that they visit the child at the hospital and in the course they met with the mother – **Kache Nyambu**.

According to **(PW1)** a discussion on the cause of the sickness arose, pointing a finger to be witchcraft by the deceased. According to **(PW1)** in a short while the accused persons joined in the conversation with an escalation of the issue of witchcraft against the deceased. While they were on it, the accused and others not before court armed with clubs assaulted the deceased on the head. In **(PW1’s)** testimony the deceased tried to take flight out of the scene but was pursued by the accused persons accompanied with persistent beatings. On this assault, **(PW1)** stated that the deceased died soon thereafter.

On cross-examination by **Mr. Obaga** for the accused persons the witness testified that one Uwezo was the first to hit the deceased. It would appear from his answer one **Mwaka** was not present at the crime scene.

PW2 James Mwarunga evidence was in respect of the land sale transactions between him, the deceased and **(PW1) - Bahati Nyamu**. He alluded to the fact that the full purchase price was yet to be paid, which necessitated the deceased and **(PW1)** to follow up on the issue prior to him being assaulted.

The next sequence of evidence in this case was on the post mortem report by **Mansoor** produced in Court as exhibit 1 on behalf by **Dr. Ndolo** of Kilifi County Hospital. From the postmortem examination **(PW3)** gave evidence that the deceased had multiple injuries to the head and eventually he died out of hemorrhage secondary to head injury.

PW4 – PC Leonard Muthuri stated in court that the investigations had already been concluded by **PC. Mayaka** when the file was handed over to him on the alleged incident of murder. He admitted not to have conducted any additional investigations.

With all that in mind the trial therefore raises an issue as to whether the prosecution has discharged the burden of proof beyond reasonable doubt.

In determining this case I bear in mind Section 306 (2) of the Criminal Procedure Code in which case each accused was placed on his defense.

The 1st accused in his unsworn statement denied the charge and that he was also told of the death by other members of the public.

As for the 2nd accused he denied the charge alleging that on the material day he was at the stage where he found his uncle lying down motionless. That is the time he decided to remove the body and later burial arrangements were made which he alleged he was only supposed to be associated with the murder for the crime which he never committed. That therefore formed the defence case on this trial by the accused persons.

In determining culpability, I bear in mind that the burden of proof is always vested upon the prosecution to prove the guilt of the accused persons beyond reasonable doubt. The burden never shifts at any time to the accused persons except in circumstances provided for under Section III of the Evidence Act (see, **Republic v Subordinate Case of the First classily at City Hall (32006, EA 330 Gupta v Republic versus (1983) KLR 391 Njoki Ndrangu v Republic CA Appeal No 262 of 2007 Kioko V R (1983) 289** in the above cases it was emphasized that the burden of proof remains with the state through the prosecution agency to prove all the ingredients of the various offences facing the accused person, beyond reasonable doubt.

That burden is never for the accused to prove anything even when the accused persons raises the defences of intoxication or provocation insanity, alibi, self-defence such kind of defences.

“However, its important to note that the burden of proof requested of the state is not to prove the offence to absolute certainly. Nevertheless, the prosecution evidence should be of high standard so as not leave any other logical explanation to be derived from the facts, except that the accused committed the offence” (Woolmington v DPP (A.C 462)

Such an obligation for the state now arises in this case for the offence of murder against the accused persons to prove the following elements:

(a) The death of the deceased

(b) That the death was unlawful and caused with malice aforethought

(c) That the accused persons are positively identifiable and place squarely at the scene

(d) That in this case being a charge of more than one accused person, the doctrine of common intention in the execution of the unlawful purpose is demonstrated by way of evidence.

Turning to the prosecution evidence relied upon in support of the charge the following conclusions can be drawn against each ingredient

(a). The death of the deceased.

The prosecution evidence Shows that **Nyambu Shoka** is dead. The post mortem examination report dated 17.8.2017 by **Dr. Mansoor** confirms and opines the death of the deceased identified by **Bahati Nyambu** and **Pauline Pola**. The prosecution by **Dr. Mansoor** admitted in evidence established that the deceased suffered multiple fractures to both right and left temporal bones. The defence offered by the accused persons does not dispute the death as prove by the prosecution evidence. In **Rex V Mumbi S/o Ipopo (1946) is EACA 94 “Cause of death is usually proved by medical evidence”** Therefore in the initial case the prosecution has discharged and the burden of proof that the deceased is dead beyond reasonable doubt **(b). The next ingredient to determine is whether the death of Nyambu Shoka can be stated to be unlawful.**

This ingredient involves the unlawful acts of or omission on the part of the accused which resulted in the death of the deceased. In the case of **Republic v Cheya and another (1973) EA 500** the court held that:

“the fact of death and the cause of it could be established otherwise than medical evidence”.

In this element case the prosecution adduced evidence of **(PW1) – Bahati Nyamu** who recalled the events of the 15.8.2017 when the deceased was violently attacked by one Uwezo while armed with a rungu and simultaneously joined in the assault by the accused persons to inflict harm on the head. According to **(PW1)** evidence, the deceased attempts to seek safety from the accused persons and other assailants did not bear fruits as they chased him to inflict further bodily injuries which violently occasioned him to succumb to death. Considering the injuries that were inflicted upon the deceased as described by the doctor who performed the post mortem examination report. The produced as exhibit 1. As stated in the post mortem examination, the fractures and other abrasions to the head resulted in severe hemorrhage secondary to head injury to result in the death of the deceased. As it was set out in the evidence of PW1 the deceased was being assaulted because the assailants believed that he had been witched **Chivatsi’s** child.

So again as held in **REX v Kajuna 510 Mbake (1945) 1 2EACA 104 A**

“belief in witchcraft cannot be a reasonable mistake in Law, regardless of how honesty it is held. However, pressure by the accused and however prevalent it is in that community.”

In the entire trial there was no evidence of provocation by the deceased based on acts of witchcraft performed in the heat of passion, in terms of it to generate anger or lack of self-control of a reasonable man.

There was apparently no doubt that at the time of the acts of grievous harm against the deceased the circumstances did not justify the infliction of the fatal injuries causing the premature death. In this regard, I accept the prosecution version of the evidence and do find that the death of the deceased was unlawful **(c). Turning now to malice afore thought**, I take into account the provisions of Section 206 of the Penal Code which defines the manifestation on malice aforethought to constitute the offence as couched in the following language.

“malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances;

- (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;**
- (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some people, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by wish that it may not be caused;**
- (c) an intent to commit a felony;**
- (d) an intention by the act or omission to facility the flight or escape from custody of any person who has committed or attempted to commit a felony.**

The tests of malice aforethought is to be properly understood in so far as the evidence by the prosecution presents and manifests the following circumstances. The nature of the weapon used, how it was used, the manner used to inflict the injuries part of the body informed conduct of the assailants before, during and immediately after the injuries were inflicted. (see **R V Tubere 510 clear (1945) 12 EAZA 63 Ojwang v .. (1999) 2 EA SCU Njoroge v Republic (1983) KLR 197 Peter Okoth & Another v Republic (1964) EA 103, Earnest Asami Bwire Abunbg alias Onyango v Republic CCACRA No. 32 OF 1990Mbugua v Republic (2000) 1 EA**. In the instant case the intention to kill can be inferred from the evidence of PW1 who told the court on how the accused planned to execute the offence against the deceased under the mistaken belief that he had bewitched his grandchild. According to PW1 on the 15.8.2017 he witnessed the brutal killing of the deceased jointly by the accused persons using all manner of weapons, identified as runigus and bottles targeted at the vulnerable parts of the body.

The postmortem examination report admitted in evidence showed the deceased having suffered multiple fractures on both right and left deep to expose the brain matter. That is how the bleeding of the deceased organs was triggered by the multiple injuries. The cause of death was opined to be hemorrhage and head injury. The fact of malice to this case as set out by **(PW1)** and corroborated by the medical evidence shows that the injuries sustained by the deceased were inflicted repeatedly with an intention to cause death or to do grievous harm. The head is a vulnerable part of the body, whose injury dismeted other parts of human body. The evidence of **(PW1)** is crucial because he was at the scene of the murder. The witness further demonstrated that the accused conduct was such that despite the deceased pleading for mercy, they could not relent in inflicting more harm. Although the deceased made attempts to run away, the accused went after him to ensure that the actual violence inflicted caused death or grievous harm to the deceased. For instance, **(PW1)** told the court that the injuries inflicted resulted in instant death thereafter without even making it to the hospital. The foregoing disposes the ingredient on malice aforethought. Therefore, I do agree with the prosecution that the death of the deceased was not only unlawful was accompanied with malice aforethought of the killers.

On identification of the accused the evidence generally of **(PW1)**, and **(PW2)** supports of the principles in **Maitanyi v Republic CA CRA No. 6 of 1986 Abdula bin Wendo V RC 1953 EACA RV Turnbull and others (1976) 3 ALR ER 549**. I am convinced to hold that the prosecution has sufficiently adduced evidence to lead to a definite conclusion that the accused persons were at the scene and did participate in the killing of the deceased. Although the accused persons distanced themselves from the murder, the described exculpatory facts taken as fragmented pieces of evidence taken singly or cumulatively contains conclusive evidence of the murder committed by none other than accused.

The defence by the accused persons did not case a reasonable doubt on the prosecution case with regard to identification in circumstances that would exonerate them from the commission of the crime.

As it emerged from the prosecution case, the doctrine of common intention under Section 21 of the Penal Code is applicable to the circumstances of this case.

On the issue of co-authorship of an offence common intention generally implies premeditated, plan but this does not rule out the possibility of a common intention developing in the course of events though it might not have been present to start with. (See **Wanjero D/o Wamario v R 22 EACA 521**). Similarly, it was held in **DPP v Mudhoo & Another {1986} SCI 23** that:

“The must be a common object and this may legitimately be inferred from the separate acts of the different accused parties. There must also be simultaneile d’action and assistance reciproque again this may legitimately be inferred from the acts of different participants. The overall principle being the degree of participation of an accused party in the offence.”

In **Paniapen & Another v The Queen {1981} MR 254:**

“To constitute a common purpose, it is not necessary that there should be a prearranged plan the common purpose may be formed on the spur of the moment, and even after the offence has already commenced. Thus; if A assaults B and C, who passes by and had no previous intention of assaulting B, rushes in to join in overpowering he becomes a co-author in the assault.” (See also Rex v Chebiegon Arap Cherono {1933} 15 KLR 100, Karani & 3 others v R {1991} KLR 622).

The common intention may be proved by direct evidence or may be inferred from the surrounding circumstances. In accordance with Section 10 of the Evidence Act anything said, done or written by any of the persons deemed to have a common intention in reference as their common enterprise is relevant to the facts in issue to be proven beyond reasonable doubt. These accused persons are culpable for murder on the basis of Section 21 of the Penal Code of promoting a joint enterprise liability.

As I have pointed out, these distinctions go a long way to secure Judgment in favor of the prosecution for the offence of murder proved beyond reasonable doubt against the accused persons. To that extent, I find each one of them guilty and an order of conviction entered as a consequence of the verdict of guilt contrary to Section 203 of the Penal Code.

Sentencing Verdict

In the circumstances of this case. I have taken into account the principles of Sentencing, moral culpability of the convict, the responsiveness on the pre-sentence report, mitigation and aggravating factors. This was basically a murder committed with malice aforethought. I give due regard that aggravating factors outweigh any mitigation circumstances presented by the convict. A further consideration in this matter is the credit on sentence in compliance with section 333 (2) of the Criminal Procedure Code.

These competing considerations in conjunction with the balancing act of discretion and the principle of proportionality I sentence the convicts to a term of imprisonment of 35 years w.e.f **2nd November, 2017** the date of their arraignment in Court.

Orders Accordingly.

14 days Right of Appeal explained.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 31ST DAY OF MARCH, 2022

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R NYAKUNDI

JUDGE

In the presence of

1. Mr. Mwangi for the state
2. Juma Mwarabu Chai