



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL CASE NO. 8 OF 2019

REPUBLIC..... PROSECUTION

VERSUS

KAINGU BAYA YAA.....ACCUSED

CORAM: Hon. Justice R. Nyakundi

Ms. Sombo for the state

Ms. Mwanja for the accused person

J U D G M E N T

On 12.6.2019 **Kaingu Baya Yaa** was charged and tried before this Court for the offence of murder contrary to Section 203 and 204 of the Penal Code.

The brief particulars were that 6.4.2019, at Mukondoni, Area, at Malindi Sub-county, accused unlawfully murdered Mrimi Bacho. The accused who was represented at his trial by legal counsel **Ms. Mwanja** pleaded not guilty to the charge whereas, the prosecution case was conducted by **Ms. Sombo**, the prosecution counsel.

In this regard, the plea of not guilty set in motion the duty case upon the prosecution to prove the elements of the offence beyond reasonable doubt:

- (a). The death of a human being.***
- (b). That the death was caused by an unlawful act or omission and***
- (c). That such death was caused with malice aforethought.***

At the conclusion of the prosecution case in which six (6) witnesses were called, the accused was placed on his defence pursuant to Section 306 (2) as read with Section 307 of the Criminal Procedure Code. The accused elected to give a sworn statement of defence denying any of the elements of the offence, the pertinent evidence for the prosecution and discharge of the burden of proof and standard of proof.

According to the postmortem report marked exhibit 1 dated 11.4.2019 tendered in evidence by **PW6 – PC Thomas Simiyu**, the deceased on 6.4.2019 at 7.30 am. It is also recorded that the cause of death was intracerebral haemorrhage due to a brain trauma to the head. In accordance with the first element of the offence of murder contrary to Section 203 of the Penal Code, the state therefore has proved that the deceased **Mrimi Bacho** is dead.

Based on the evidence of **(PW1), Mweri Jefwa** on 29.3.2019 he received a telephone call about a naked person lying at scene. In response to the information, **(PW1)** visited the scene only to identify the victim as his relative who also happened to be unconscious with multiple injuries to the back and head. Together with one **Hamisi (PW4)**, the witness told the Court that the deceased was escorted to the hospital but passed away soon thereafter.

Further, the case for the prosecution by the testimony of **(PW2) – Kazungu** who testified that on 28.3.2019 the accused went to his home and at the time the deceased was also present. He testified that immediately, the accused demanded from the deceased to be paid some money. He further testified that it did not take long before the accused started chasing the deceased out of the compound. In a little while, accused came back with a caution that he should not say anything about the event or less he will face dire consequences. On the material day, **(PW2)** told the Court that prior to the act of chasing the deceased, the accused was armed with a piece of wood. As the witness hid himself for his own security, the deceased happened not to have returned back to the house.

At the time there were screams about the death of the deceased. All he could see later was the body of the deceased. In the process (PW2) and (PW3) told the Court that the deceased who had suffered serious injuries was escorted to the hospital where he succumbed while undergoing treatment. Although (PW2) did not see the accused assault the deceased he was the last person to be seen with the deceased.

In this matter I do take note of the fact that the deceased body was found with multiple injuries to the head and nervous system as documented in the postmortem report under Section 203 of the Penal Code a person is guilty of murder if he or she kills a person unlawfully i.e. not in self-defence or defence of another or accidentally, each of which provides an absolute defence and at the time intended either to kill him or cause him or her some really serious bodily harm.

My starting point in the analysis of the state's evidence on the element of unlawful killing is to be found in the testimony of (PW2) who saw the accused armed with a piece of wood. (PW2) also witnessed the chasing of deceased by the accused from the compound on the material day. Those were the last moments the deceased was ever seen alive with the accused. (PW2's) evidence gave some important insights into the circumstances in which the deceased met his death. This is in line with the findings made from the postmortem report of 11.4.2019. The nature of the injuries and part of the body targeted by the assailant came out clear in the postmortem report including the probable weapon used to inflict the serious harm.

What arises from the evidence of (PW2) are issues of *actus reus* and *mens rea* elements of an offence in a charge against the accused. The analysis herein tends to show prove of a particular fact which is material that the deceased was assaulted by the accused person. Then it went through to eliminate any other person who might have caused the fatal injuries save for the accused person. It is a legal truism in this case that the accused was the last person to be seen with the deceased alive. There was such an obligation under Section (III) of the Evidence Act for the accused to explain matters within his knowledge on how they parted ways with the deceased.

The prosecution open case and lead evidence by (PW2) supports the fact of the accused being the perpetrator of the crime of murder against the deceased. The accused was in a better position to produce some form of evidence that is within his reach to determine the issue of the deceased dying without his involvement. In absence of that tactical evidence the accused loses the case with regard to the degree of persuasion to cast a doubt in his favour. This largely and more appropriately with provisions of Section 213 of the Penal Code sufficiently convinces this Court that the cause of death of the deceased was unlawful. That element has been discharged by the prosecution beyond reasonable doubt. The charge against the accused being that of murder contrary to Section 203 of the Penal Code can only succeed once the prosecution proves, the element of malice aforethought.

As defined under Section 206 of the Penal Code malice aforethought is a term of art having little to do with the generally understood meaning of malice or of a forethought. The scheme under Section 206 of the Code denotes an intention to cause death or to do grievous harm or the knowledge model that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not.

In the instant case, according to (PW2) the accused came to the locus in quo of the deceased. There was some kind of confrontation which necessitated the accused start to chase the deceased. The accused did this while armed with a piece of wood. At the resulting murder, the deceased soon thereafter was forced alone having suffered multiple injuries to the head. In the opinion of the doctor he contextualized the cause of death as harmanegic shock to the head due to blunt trauma. In the evidence of (PW2) there was no physical fight which ensued between the accused and the deceased which he could allude at that initial 'chase'.

However, despite that fact the uncontroversial circumstances specifically point to a victim of attack who sustained fatal injuries on that material day and time when chased by the accused. In view of the evidence set out in the testimony of (PW2) and postmortem report and the Courts own judicious scrutiny malice aforethought has been proved beyond reasonable doubt against the accused.

In relation to the above elements, it was incumbent upon the prosecution to prove identification of the accused as the key perpetrator of the murder. The **Turnbull guidelines** have sense crystallized in Kenya and any trial Court has to consider the following:

(a). *How long had the witness have the accused under its view?*

(b). *At what distance?*

In what light, was the identification impended in any way. Had the witness ever seen, the accused before. How often if only occasionally had he or she any special reason for remembering the accused?

Clearly, the evidence on identification came from the witness statement on oath by (PW2).

On analysis of the evidence, I find no difficult to find that (PW2) know the accused very well prior to the attack. His evidence when weighed together with the rest in support of the charge he was to use a truthful witness. His evidence was never shaken by the defence. In that regard being of a single identifying witness I caution and warn myself that the identification by (PW2) of the accused may be mistaken, but nevertheless in this particular case there are errors or mistake to impeach the evidence of (PW2).

Subsequently, the accused was positively identified as the perpetrator of the crime against the deceased. Contrary to Section 203 of the Penal Code he is found guilty and convicted of that crime in adherence to the Law. Likewise, in the instant case, I take into account the mitigation and aggravating factors as a measure to assess the kind of punishment to pass against these considerations, I note that the convict has been in remand custody since his arraignment on 13.6.2019. That period of about 2 ½ years ought to be credited to the overall period of sentence to be imposed by the Court. In so doing I sentence the convict to thirty (30) years imprisonment.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 30TH DAY OF SEPTEMBER, 2021

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R. NYAKUNDI

JUDGE

In the presence of

1. Mr Mwangi for the state
2. Ms. Mwanja for the accused person
3. Accused