



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL CASE NO. 3 OF 2018

REPUBLIC..... PROSECUTOR

VERSUS

KATANA KARISA SHIKARI.....ACCUSED

CORAM: Hon. Justice R. Nyakundi

M/s. Ruttoh for the Accused

Mr. Mwangi for the State

J U D G M E N T

Katana Karisa, the accused herein was charged and tried for the offence of murder contrary to section 203 and 204 of the Penal Code. On particulars it is alleged that on 8/1/2018 at about 17.30hrs at Ziara Wimbi Village, the accused murdered **Shani Safari Baya**. He pleaded not guilty to the charge.

Following a plea of not guilty, the prosecution called a total of (9) nine witnesses and the accused testified by erecting to give unsworn statement. The accused as required by the constitution was represented by **Ms. Ruttoh** whereas **Mr. Alenga** a Senior Prosecution Counsel appeared on behalf of the state.

The summary of the evidence set out by the prosecution in support of the charge is herein stated by the Court.

(Pw1) Rita Katana testified that on 8.1.2018, at about 5.00Pm she left school for her home in company of her brother **William (Pw2)**. On arrival **(Pw1)** and **(Pw2)** told the court that they found the accused, their grandmother, Kapombe, grandfather Karisa present. At the same time **(Pw1)** and **(Pw2)** testified that the accused was quarrelling the deceased in their presence. As Pw 1 entered the house to keep her books she heard screams from the deceased shouting that she had been cut by the accused with a panga. In that subsisting circumstances, the grandparents came to their house as **(Pw1)** walked to her Aunt seeking for assistance for the deceased to be taken to the hospital. It was at the hospital she died while undergoing treatment. As this was a matter for the police to take action, **(Pw1)** stated that she was asked to record the statement on the incident.

According to **(Pw2)** immediately as he arrived home with **(Pw1)** the quarrel escalated with the accused stabbing the deceased using the panga duly identified in court as an exhibit. **(Pw2)** confirmed that he witnessed the accused assault the deceased with that panga occasioning serious injuries as diagnosed at the hospital.

Karisa Shikari (Pw3) testified as the father to the accused on the fateful day and time, **(Pw3)** told the court that he happened to be at the home of both the accused and the deceased. It was for the purpose of resolving the family conflict between the accused and the deceased. That reconciliation never took place and therefore he agreed with the accused that another meeting was to be rescheduled for another day. He was later to respond to screams from the accused house and on arrival he saw him holding the hand of the deceased while armed with a panga. According to **(Pw3)**, unfortunately as at that time the accused had stabbed the deceased on the head with that panga inflicting fatal injuries. Thereafter a boda boda was hired, hence on ferrying the deceased she was pronounced dead on the way to the hospital. The witness then left to make a report at the police station.

(Pw4) Mary Zawadi informed the Court that she was a sister to the deceased who was married to the accused. Her evidence was in respect of being reported to by **(Pw1)** that the accused had assaulted the deceased inflicting physical harm. She followed the deceased who had already been escorted to the hospital but could not make it as she died on the way.

The other witness for the prosecution was **(Pw5) Patrick Kalama** an Assistant Chief of Wacha Sublocation who testified that a report was made to him in respect of the assault incident by the accused against his wife the deceased. He proceeded to the scene only to find the deceased in great pain struggling to come to terms with the injuries sustained. As the Assistant Chief of the area he took the first step of

informing Bamba Police Station. The police visited the scene to initiate investigations on the circumstances of the crime. It is apparent from the evidence that the deceased body was taken to the mortuary for purposes of carrying out a post mortem examination.

According to **Dr. Ndalo (Pw6)** the postmortem examination was conducted by **Dr. Masudi** currently on study leave. Nevertheless, she confirmed having worked with the said medical officer and therefore conversant with his handwriting. The court permitted her to produce the postmortem report on her behalf. Her evidence was to the effect that the deceased suffered injuries to the head, right temporal region, left temporal region, parietal region, and right lower limb classified as multiple injuries. **Dr. Masudi** concluded that the deceased died due to massive haemorrhage secondary to severe injury.

It was also the evidence by the prosecution from **(Pw7) Pc Caleb** and **(Pw8) Pc Felix** of Bamba Police Station who told the court on the steps taken to apprehend the accused person. In their testimony this was done with the assistance of the village elder. As a consequence, further operation **(Pw7)** and **(Pw8)** confirmed to the Court that on 13/2/2018 the accused person was arrested as a suspect of murder for the killing of the deceased.

Lastly, it was the evidence of **(Pw9) Pc Peter Odhiambo** who was then at Bamba Police Station and duly instructed to take over investigations of the matter. According to Pw 9, from the recording of witness statement, the postmortem report it was apparent that the accused had committed the murder against the deceased to that extent Pw 9 recommended a charge of murder be preferred against the accused person.

At the close of the prosecution case, the accused person was placed on his defence, what was the accused answer to the allegations made against him by the state? In an unsworn evidence, the accused told the Court that on 8/1/2018 he came back home at 5.00Pm when he met his father with the deceased inside the house. There was a quarrel that ensued between the father and the deceased. Thereafter he asked the deceased to leave the house to the rear part of their home. It did not take long he heard screams from the direction of the farm. He then went to check only to find her bleeding from the head. He made arrangements to have her escorted to the hospital but she passed on while undergoing treatment. He denied that he was involved in the killing of the deceased.

Analysis and Determination

This case arises from a terrible crime of murder contrary to section 203 and 204 of the Penal Code. The features of the offence are that any person who kills another human being unlawfully and with malice aforethought is guilty of the offence of murder. Once an accused person has been indicated with the offence under section 203 of the Penal Code, the state is under a duty to prove the charge beyond reasonable doubt. This is an all-time burden which rests entirely always with the prosecution in their discourse to prosecute crimes on behalf of the state. That burden at no circumstances does it shift to the accused person save in exceptional circumstances provided under Section (iii) of the Evidence Act, but even in some scenarios the burden of proof is on the state throughout the trial to disapprove the innocence of the accused person. (See **Kioko V R [1983] 1KLR, Mbugua Kariuki V R [976-80] KLR, in Rep V John Nguma [1944] 11 EACA 119** the Court held; -

“That the state has to discharge the burden of proof on any given issue, and lost on that issue if upon the evidence advanced is created in the record of the Court. Such doubt is resolved in favour of the accused person, and the state is said to have failed to prove its case beyond reasonable doubt”.

In a criminal homicide under section 203 of the penal code the state is therefore under a duty to prove the following elements; -

- a) The death of the deceased***
- b) That the death was through an unlawful act***
- c) That in causing death, the perpetrators had malice aforethought***
- d) That it was the accused before crime solely or jointly with others who killed the deceased***

In Kenya, therefore murder under section 203 of the Penal Code is unjustified and unexcused of killing of another human being by another human being with malice aforethought. Malice aforethought as a state of mind which distinguishes murder from other homicides is clearly defined in section 206 of the Penal Code. It is a technical term which manifests itself in the following definite statements to be proved by evidence of witness statements by the state.

- a) The intent to kill***
- b) The intent to do grievous harm***
- c) Knowledge that the act or omission will cause death***
- d) Intent to commit a felony***
- e) Intent to facilitate the escape from custody of a person who has committed a felony***

The intent to kill being a state of mind may be influenced from the acts, and conduct of the accused person before, during or immediately after the commission of the offence. Thus, if the evidence shows that the accused armed himself or herself with a dangerous weapon that is pistol, machete, knife, panga, firearm etc. If any of these targets the victim's vulnerable parts of the body and death ensues, it is reasonable under section 206 of the Penal Code to infer malice aforethought.

The law does not envisage any specific intent to be proved by the prosecution. All malice is expected is for the prosecution to adduce evidence that the accused unlawful acts were intended to cause death or grievous harm to his or her victims that resulted in death. At its face value however, it means thought of beforehand and it implies the mental process involved in killing setting out a plan and pondered over for a substantial period of time in advance. That is why in murder cases within our jurisdiction it is generally acceptable to manifest and establish the offence on the basis of an intent formed by the accused immediately before the act is actually committed or at the very moment the fatal blow, stab or shot was fired. It is also correct to state that if the unlawful act flows from the intent as mapped by as the thoughts may pass, through the mind and if the intent to kill or to do grievous harm is followed by an act or omission which result in the death of another human being; that killing would be said to be accompanied with malice aforethought, simply put malice aforethought is the intentional doing of an unlawful act.

Reference to the intention to kill or inflict grievous harm or knowledge that the act or omission will cause death has received considerable attention in the following cases; -**Mandere V RCACRA No.59 of 1997, Ogeto V R [2004] 2 KLR, Guyo Duba V R CACRA 89 of 1999, Rex V Tubere S/O Ochen [1945] 12 EACA 63, Ernest Asami Bwire Abanga alias Onyango v R CACRA No.32 of 1990, Karani and 3 Others V R [1991] KLR 622, Peter Okoth V R C 1964 EA 103 Mukakya V R [1963] EA 376.** Obviously as stated in the above authorities, no more phrase can serve as a solution for all cases in which this issue may be involved but such character of evidence that points in the general or specific direction that the killing was motivated with a combined element of malice aforethought. It's an intention to kill or cause bodily harm which an accused person manipulates any weapon or instrument and uses it in a dangerous manner targeting vulnerable parts of the body of another human being and there is a cruel death caused.

In the instant case there is sufficient evidence from **(Pw1) Rita Katana, (Pw2) William Baya, (Pw3) Karisa Shikari** which indicates that the accused armed himself with a panga used to inflict multiple injuries to the head. On this evidence, Court must direct attention to the evidence of these witnesses which isolates acts of battery with act of causing grievous bodily harm as it happened with the deceased. Such blows by the accused particularly directed at the head was not expected to cause pain but circumstances which measure up to the degree of violence which in the court's mind caused the death of the deceased. There is also great disparity of the excessive and fatal force used against a defenseless victim, by reason of the latter being of weaker sex in relation to the accused.

So far in this case attention has also been drawn to the post mortem examination report dated 11/1/2018 which depicts brutal killing as supported by the multiple injuries inflicted to the head. Under such circumstances its obviously plain and strong that death was bound to result as a consequence of the unlawful acts of the accused.

A glance of the history of this matter shows that the accused had developed some view of ill will or hate against the deceased. This is reflected in the evidence given on oath by **(Pw3) Karisa Shikari** the father of the accused. It was said by the witness, that he had been called together by his wife to go to the home of the accused in company of the uncle then to settle family conflict that there was as reported by the children. Instead of the accused agreeing for the differences to be resolved, he elected to use excessive force. In the same degree of wanton and willful disregard for human life of the deceased. Furthermore, there was no provocative action by the deceased to warrant the accused acts of assault. The fallacy involved in this crime is the view of defence given by the accused in answer to the murder charges. The relative sense of his defence that he also came to learn of the death of the deceased.

In this specific case the accused was positively identified and squarely placed at the scene by the appreciative evidence of **(Pw1), (Pw2) and (Pw3)**. A combination of the surrounding circumstances are comprehensible for the offence was committed in broad day light. It is also instructive to note that **(Pw1), (Pw2) and (Pw3)** were his children and a biological father to the accused. It is too much of a lie for the accused to say that he was not at the scene where his wife was assaulted to death.

Speaking of the identification of element. From the case of **Antoine & Others V R (1976 -80) IKLR** as a guide to clarify recognition of the accused it is clear his identity was not mistaken nor did the witness error to confuse him with someone else. The evidence by the prosecution is consonant with the principles in the above case:

“This was however, a case of recognition, not identification of the assailant is recognition of an assailant is more satisfactory, more asserting and more reliable than identification of a stranger because it depends on the personal knowledge of the assailant in some form or another”.

See also **Wamunga V R (1989) KLR 424.**

“Noticeable from the evidence of Pw 1, Pw 2 and Pw 3, in substance at the outset, the circumstances attending an act of unlawful homicide were favourable for the accused to be personally identified by the aforesaid witnesses”.

No intelligent Court would cast adverse inference to that truthful, convincing and credible evidence from the prosecution which stands uncontroverted by the defence of the accused. I am therefore satisfied to rule conclusively that all these incidents referred to by the prosecution witnesses on direct and circumstantial evidence point to an unlawful killing with malice aforethought of the deceased. Therefore, the crime of murder is what accused is found culpable of by the Court.

I agree with the prosecution that the evidence brought against the accused proved beyond reasonable doubt that the accused killed the deceased contrary to section 203 of the Penal Code. I accordingly find him guilty of the offence forementioned with a conviction. The learned counsel shall submit on sentence.

Verdict on Sentence

The convict herein has already been convicted for the offence of murder contrary to section 203 as punishable under section 204 of the Penal Code. During the sentencing hearings, the convict aged forty-three (43) years old told the court that he is a family man and sole breadwinner. In this respect, the court should exercise discretion so as to pass a non-custodial sentence. It also emerged that the convict has been in remand custody for four (4) years, which in essence ought to be credited to the final order pursuant to section 333 (2) of the Criminal Procedure Code. In my view, the highlighted mitigating factors but mindful of the grave nature and the aggravating factors that go with it I sentence the convict to twenty-four (24) years imprisonment. The period of four (4) years has been factored to reduce the stipulated period of twenty-eight (28) years which could have been the appropriate sentence for this offence.

Orders accordingly.

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

.....

R. NYAKUNDI

JUDGE

In the presence of:

1. Ms. Rutto for the accused person
2. Mr. Mwangi for the State
3. The accused person