REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL CASE NO. 22 OF 2015

REPUBLIC.....PROSECUTION

VERSUS

1. RAJABU KAINGU CHENGO..... 1ST ACCUSED

2. SARANGI KATANA NDOKOLANI.....2ND ACCUSED

3. KARANI KEA NDUNDA.....3RD ACCUSED

Coram: Hon. Justice R. Nyakundi

Mr. Mwangi for the state

Mr. Ogeto for the accused persons

JUDGMENT

The accused persons are charged with the murder of the deceased **Kazungu Karabu Nzao.**

The statement of the case is that on 3.10.2015 at Mkwajuni village, Bura Sub-Location, accused persons jointly with others not before Court murdered the deceased. The Investigating officer witnesses summoned by the state to proof the elements of the charge beyond reasonable doubt stated as follows:

PW1 – Robert Karisa told the Court that he and deceased were together on 3.10.2015. It happened when the deceased took his phone for charging and immediately thereafter the first accused with other youths armed with clubs (rungus) physically started to push the deceased towards the road. It was while at that road another group of men joined in also armed with pangas and clubs shouting – 'mkate' it follows that each of the men at scene started assaulting the deceased. The witness described what he saw being the injuries suffered by the deceased which culminated in arrangements made to escort him to Malindi Hospital.

(PW2) – Ngumbao Katana in his evidence in chief told the Court that on the material day while sleeping, he heard screams from the direction of a nearby road. That is when he saw a big crowd of people with the deceased running infront of them. According to **(PW2),** the 1st and 2nd accused persons were among the group of people chasing the deceased. The witness did say that he was able to identify the accused persons more clearly when they were coming back from the scene bragging that they have finished him. He further added that on visiting the scene he managed to notice the deceased on the ground and bleeding from the injuries. He further testified that a report made to the clan elder **(PW5) – Thomas Yeri – Kombe** and the **Area Assistant Chief (PW7) – Chengo Karisa** resulted in arrangements being made to take the deceased to the hospital. That is where he passed on while undergoing treatment.

(PW3) – Samwel Kombe Ngumbao – a wine taper told the Court that on 3.10.2015 he heard a voice to the effect – kill him, kill him and immediately he saw a crowd of people in hot pursuit of the deceased. The witness stated that in that crowd he saw the 1 st and 2nd accused armed with a cub and a panga respectively. That is when he saw from a distance the two accused persons assaulting the deceased in company of others not before Court. When they were done with their mission **(PW3)** confirmed that he saw them again pass through their house from the directions of the scene.

(PW4) – Kombe Manyeso told the Court that on 30.9.2015 he was assaulted by the first accused over an incident involving a child born out of the marriage union. The witness testified that the allegation was being propagated by the deceased. While in police custody he heard that the deceased died while undergoing treatment at Malindi – Sub-county hospital.

(PW6) – Kadhua Safari Kapishi identified herself as a palm wine seller. She gave an account in regard to the 3.10.2015 when she saw a group of people among them was the 1st accused. In short while she received information that the deceased has been beaten to death.

(PW8) – Dr. Angore Gilbert testified and pointed out that on 16.10.2015 he was able to conduct a post-mortem examination involving the body of the deceased as identified by the relatives and a police officer. **(PW8)** further gave evidence that the positive findings noted involved deep cut wounds on the paneral region of the head. The ear and penetrating wound to the head. On evaluation of the findings, (PW8) found the opinion that the death of the deceased was due to deep penetrating wound to the scalp secondary to internal bleeding.

(PW9) – Nyevu Charo Kitete adduced evidence to the effect that on 3.10.2015 she ran to the scene of murder in which the deceased had been assaulted to death. **(PW9)** further testified that she became one of the persons including **(PW5)** to accompany the deceased to Malindi Hospital to seek treatment. She however told the Court at the time she was not able to identify who the attackers were to have inflicted harm.

(PW10) – Chief Inspector Gachago testified on how he participated in investigating the offence. From the evidence **(PW10)** told the Court that the three accused persons were positively identified as the perpetrators of the murder. **(PW10)** pointed out that with evidence at hand accused persons were arrested to face trial for culpable homicide against the deceased.

At the close of the prosecution case, each of the accused was placed on his defence. The 1st accused responding to the charge denied any participation as alleged by the prosecution witnesses. **(DW1)** also stated that he specifically heard that the deceased has been killed.

(DW2) – Karani Ndinda denied ever knowing the deceased save to acknowledge that while at the palm wine club he heard people conversing about the death. **(DW3)** the second accused who elected to give unsworn statement went on to say that he only learnt of the death of the deceased from the neighbours. That the motive was due to the family of **Mwaka** revenging following an earlier assault by the deceased. The two reasons of the evidence form the background in which to make a finding against the accused persons.

Determination

The question before this Court is whether on the basis of the evidence the offence of murder contrary to Section 203 has been proved beyond reasonable doubt.

The Law requires the prosecution to present evidence to prove the charge beyond reasonable doubt on the following grounds:

(a). The death of a human being by the name Kazungu Karabu Nzao.

(b). That the death was caused unlawfully.

(c). That the unlawful act was done with malice aforethought.

(d). That the Law relating to identification placed the accused persons at the scene.

It is important that the evidence led by the prosecution be clustered as either direct or circumstantial and whichever the case, the guilt of the accused persons must be proved beyond reasonable doubt **(See Rex v Ismaili Epuku s/o Achietu {1934} 1 EACA 166, Hatibu Bin Rashid & Another v The Queen {1936} 29 KLR 172, Woolmington v DPP {1935} AC 462, Miller v Minister of Pensions {1947} 2 ALL ER 372).**

The general rule in Criminal cases is well settled that the burden of proof rests with the prosecution founded on the provisions of 107 (1) and 108 of the Evidence Act that he who alleges must proof existence or non-existence of fact for Judgment to be obtained in his favour. **(See also R v Nyambura & 4 others {2001} KLR 355).**

It is why in exceptional cases the burden of proof may shift to the accused to proof certain facts as stipulated under Section (1) of the Evidence Act. For instance, in murder cases if the accused person was the last one to be seen with the deceased before his or her demise, it would necessitate him to explain the circumstances under which he parted with the deceased.

Therefore, against this background how does the prosecution case fair in the instant case:

(a). Death of the deceased

As regards this element, the prosecution tendered medical evidence as to the death of the deceased by **Dr. Angore (PW8)**. In his testimony from the post-mortem examination, there was evidence of serious injuries to the head caused by a deep penetrating wound. **Dr. Angore** opined the cause of death to be head injury secondary to bleeding. It was further established from the evidence of **(PW1), (PW2), (PW3), (PW4), (PW5) and (PW6)** that the deceased well known to them was hacked to death by assailants. The body of the deceased under instructions of the D.C.I.O was carried from the scene to Malindi Hospital Mortuary.

On this issue it remains beyond peradventure that the prosecution evidence relied upon proves the death of the deceased beyond reasonable doubt.

(b). On the issue of unlawful act of omission, a good need is taken from the direct evidence of **(PW1) Robert Karisa, (PW2) Ngumbao Katana, (PW3) Samwel Kombe Ngumbao and circumstantial evidence by (PW5) – Thomas Yeri Kombe.**

(PW6) – Kadhuba Safari, (PW7) – Benson Karisa, (PW8) – Dr. Angore, (PW9) – Nyevu Charo and finally **(PW10) – Chief Inspector Gachago**. Their cumulative evidence has two elements that the act of assault resulted in inflicting grievous harm whose outcome was the death of the deceased.

That post-mortem by **Dr. Anogore (PW8)** was of essence because death was instant after the penetrating wounds to the head. The circumstances of this offence are that it is not difficult to infer as stated under Section 213 of the Penal Code that ***"an accused person may be held responsible for the death of another even if the injured person had not submitted himself to proper medical or surgical treatment…."*****(See Rex v Okute s/o Kalichi & Another {1941} 8 EACA 78** the Court held:

> ***"that where the deceased died due to shock resulting from two independent beatings, the first appellant was in the party which inflicted the first beating while the second appellant participated in the second beating. From the facts of the two appellants were found to be guilt of murder."***

In the instant, the deceased suffered grievous harm by means of multiple clubs and pangas and on the same day he succumbed to death.

The factors in favour of the prosecution include the direct unlawful acts of assault shown to have caused the death of the deceased without any provocation as defined in Section 207 and 208 of the Penal Code. It was stated also in **R v Gusambizi s/o Wesonga {1948} 15 EACA 65** death of another human being is excusable only in self defence of self, property or defence of another under imminent danger.

In the instant case, the deceased died out of defenceless injuries inflicted by people known to him and the neighbours. From the perspective of the Court the evidence leans towards deprivation of right to life unlawfully. The defence in rebuttal by the accused persons failed to controvert both direct and circumstantial evidence on the cause of death being unlawful.

> ***(a). The other critical element to prove murder is that of malice aforethought provided for in Section 206 of the Penal Code. It defines malice aforethought as an intention to cause death of any person whether such person is the one actually killed.***
>
> ***(b). An intention to cause grievous harm to another.***
>
> ***(c). Knowledge that threat or omission will cause death of some person whether such person is the person actually killed or not, although such knowledge is accompanied by indifference by a wish that it may not be caused.* (See Rex v Tabuyaerika s/o Kirya {1943} 10 EACA 51, R v Karioki wa Njagga {1934} 1 EACA 149, R v Ndalamia & two others {2003} KLR 638).**

In the case of **Ernest Asami Bwire Abanga alias Onyango v R Nairobi CACRA No. 32 of 1990,** the Court held interalia that:

> ***"Malice aforethought is deemed to be manifested while the deceased was killed through a planned and brutal manner inflicting multiple injuries with a dangerous weapon or one manipulated to sustain fatal injuries to vulnerable parts of the body."***

In the instant case malice aforethought can be inferred from the evidence of **(PW1), (PW2) and (PW3).** The cause of death as opined by **(PW8)** corroborates. The assault evidence by the above witnesses. The evidence is consonant with the principles in **Rex v Tubere s/o Ochen {1945} 12 EACA 63.**

Further in the case of **Nanyonjo Harner & Another v Uganda CR Appeal No. 24 of 2002 SC,** the Court stated that:

> ***"For a Court to infer that an accused killed with malice aforethought, it must consider if death was a natural consequence of the act that caused the death, and if the accused foresaw death as a natural consequence of the act."***

So far as this case is concerned, the position is that the prosecution has discharged the burden of proof of beyond reasonable doubt to demonstrate that the assailant intention was to kill the deceased. I now turn to the last element on identification. It has been held in several decisions that identification evidence should be approached with great care and caution. **(See the principles in Simiyu & Another v R {2005} 1 KLR 192, Kariuki Njiru & 7 others v R CR Appeal No. 6 of 2001, Wamunga v R {1989} KLR 424)**.

Having examined and carefully weighed all the evidence by **(PW1), (PW2), (PW3) and (PW5)** clearly they saw the accused persons assault the deceased. As for **(PW5)** his testimony is categorical that the accused persons in company of others not before Court while armed with clubs and pangas informed him that they had finished killing the deceased.

At no time from the evidence of **(PW1), (PW2), (PW3) and (PW5)** can one say that their visual recognition of the accused was impaired by the prevailing circumstances or distance. Their respective testimonies were never impugned during cross-examination nor contradict each other in any way. In this matter, the witnesses **(PW1), (PW2)** and **(PW3)** identified the accused persons immediately at the scene and did report this fact to the police very shortly thereafter as confirmed by **(PW10).**

This act of identification was objected to in the hearing at the defence stage by introducing an alibi defence. This was an allegation that each of the accused was elsewhere other than the scene of crime. There is no doubt that the degree of visual identification by the witnesses dislodges any of the alibi defences put forth by the accused persons. The circumstances giving rise to the positive identification began with the degree of prior familiarity between the witnesses and the accused persons.

Reverting to the alibi defence with great respect to the accused persons, the nature of the defence lacks material and better particulars as to render the evidence by the prosecution unsafe to convict them of the offence. It is not in dispute that each of the accused raised the alibi defence in the course of their defence in answer to the charge the paramount issue before the Court is whether identification evidence was such that it can be concluded to be mistaken and highly prejudicial to the accused persons put briefly the essence of the alibi defence was to require the prosecution to investigate it and if found sufficient, the benefit of doubt to be resolved in favour of the accused persons.

The question arises whether the failure by the prosecution to seek an adjournment to investigate the alibi defence as fatal to the proceeding before this Court. The **Supreme Court of Nigeria** said of this reasoning in **Patrick Njovens & 8 others v The state {1973} 5 SC 12 at 47** that:

> ***"It is settled Law that it is not every failure by the police to investigate an alibi by an accused person that is fatal to the case of the prosecution, there is nothing extra ordinary or esoteric in a plea of alibi. Such a plea postulates that the accused person could not have been at the scene of the crime and only inferentially that he was not there. Even if it is the duty of the prosecution to check on a statement of alibi by an accused person and disapprove the alibi or attempt to do so, there is a flexible and verifiable way of doing this. If the prosecution adduces sufficient evidence to fix the person at the scene of the crime at the material time, surely his alibi is thereby logically and physically demolished."***

It seems to me that in this case, the evidence stated by the prosecution creates a causal link between the commission of the crime and the active participation of the accused persons. There is in my view little substance in the alibi defence to create a doubt in the mind of the Court that it was not the accused persons who armed themselves to attack and fatally injure the deceased. In light of these considerations, I find the charge of murder contrary to Section 203 of the Penal Code proved beyond reasonable doubt jointly and severally against the accused persons as premised under Section 20 and 21 of the Penal Code.

> ***"The operation of the doctrine does not require each participant to know or foresee in detail the exact way in which the unlawful results are brought about. The state is not required to prove the causal connection between the acts of each participant and the consequence, for example, murder. In accordance with this provision, a person can be held criminally responsible if that person commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible. In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or be made in the knowledge of the intention of the group to commit the crime."***

Accordingly, I find each of the accused persons guilt and do make an order of conviction for the offence of murder as per Law established.

Sentence

In this sentencing hearing, the convicts **Rajab, Sarangi** and **Karani** advanced the arguments on mitigation seeking the Court to temper justice with mercy so as to sentence each one of them to non-custodial sentence.

To break the mitigation down further, the convicts assumed that their responsibilities as family providers would invite new dimensions for the Court to consider a lesser sentence. First and most fundamentally on the record are aggravating factors necessarily with a direct import on the nature of the sentence to be considered. Faced with convicted murderers, it would be all but impossible for the Court to five more weight to mitigating factors under our precedent setting cases like **Muruatetu**, this Court more limited role is to safeguard the limits imposed by the cruel and unusual punishment clause in Article 29 of the Constitution. **(See Francis Muruatetu v R {2017} eKLR).** I also acknowledge that the Courts precedents require discretionary sentencing procedure in a case of this kind.

Finally, my holding today is that taking into account the mitigation and aggravating factors, reasoning by analogy from the record, more weight detours aggravating factors at one point or another. Rather than accept the mitigating factors plainly in this case they carry lesser weight to influence the sentencing options against the convicts. If **Muruatetu (I)** is correct, homicides crimes like the one committed by the convicts reflect irreparable harm to the victims' family. I doubt whether society could tolerate a lenient sentence for murder without a satisfactory explanation. In response this individualized case lacks compelling and substantive evidence to attract a notion of a non-custodial sentence.

As a consequence, under Section 204 of the Penal Code and the guidelines in **Muruatetu (supra),** I do exercise discretion to sentence each of the convict to twenty-six (26) years imprisonment.

It is so ordered.

14 days right of appeal explained.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 28TH DAY OF OCTOBER 2021

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R. NYAKUNDI

JUDGE

In the presence of:

1. The accused persons

2. Mr. Mwangi for the state