



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL CASE NO. 18 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

KITSAO BAYA THOYA.....ACCUSED

Coram: Hon. Justice R. Nyakundi

Mr. Mwangi for the state

Mr. Gicharu Kimani advocate for the accused person

J U D G M E N T

On 1.10.2019, the accused **Kitsao Baya Thoya** was arraigned in Court charged with the murder of **Kahindi Baya Thoya alias Panga** allegedly which occurred on 26.9.2015 at Kinjora location contrary to Section 203 as read with 204 of the Penal Code. The accused pleaded not guilty and in his defence he was represented by **Mr. Gicharu Kimani** and state was also represented by **Mr. Mwangi**, the prosecution counsel.

In order to discharge the burden of proof of beyond reasonable doubt, the state summoned six witnesses and their evidence in brief was as follows: **(PW1) – Baraka Sheikh** was called to take witness stand. He stated that on 26.9.2019 while attending a burial of a neighbor an issue arose to the effect that the deceased was the one who bewitched that child. He further testified that as a result, some in revenge went for the deceased whom they assaulted until death at the same time showing him the grave of the deceased. According to **(PW1)** it happened that the child who died was a daughter to the accused.

(PW2) Thoya Baya, testified that on 8.10.2015 he was invited by the police to witness the postmortem examination being conducted upon the body of the deceased. **(PW3) Bonface Baya** also testified to the effect that on 26.9.2015 he travelled to the accused's home to attend a burial ceremony. In the course of the event the **Deejay** announced that one **Baraka Kitsao** has passed on. The family was walking and screaming mentioning his father in bad light. That he may have something to do with the death of **Baraka**. In a little while his father had also been killed.

(PW4) Furaha Baya testified that while at home of her parents, the deceased **Kahindi Baya**, some two people driving motorcycles drove into their homestead. **(PW4)** further testified that on gathering entry they demanded to see the deceased. According to **(PW4)**, the two men were in company of the accused. She further testified that forcibly they took away the deceased promising to return but that never happened. Further, what followed were screams indicating of an assault against the deceased. Before she could go to the scene she heard the people who were screaming say that he was also being burnt. However, it came to pass that although she did not witness the killing her father was confirmed dead.

(PW5) Kazungu Katsina testified that on 25.9.2015 he was at their home in company of the deceased and **(PW4)**. He testified that one **Jumah** and **Wiach** riding a motorcycle came to their home and thereafter drove away with the deceased. It did not take long before information trickled in that the deceased has been burnt. On cross-examination, **(PW5)** told the Court that he did not see the accused on that material day.

(PW6) – No. 77338 PC. Bakari testified that under instructions from the DCIO – Malindi. They recorded witness statements in regard with the murder of the deceased. He further testified that in the course of the investigations, it was established the deceased had been suspected as a witch who caused the death of the accused's child. According to **(PW6)**, the evidence which they recorded showed that the accused and others not before Court participated in the murder of the deceased.

At the close of the prosecution case, accused was placed on his defence. The accused elected to give a sworn testimony in which he denied

the offence of killing the deceased. The accused further told the Court that on the material day he spent most of the time at the hospital nursing the sick child. In essence the accused put up an alibi defence as a rebuttal to the prosecution case connecting him with the murder.

Determination

There are two main issues for determination in this trial:

- 1. Whether the evidence by the prosecution has proved the offence of murder contrary to Section 203 against the accused beyond reasonable doubt.**
- 2. If the answer to the above issue is in the affirmative whether the defence of alibi avails the accused.**

The burden of proof

There is no burden to be shouldered by the accused person, no matter the circumstances except in a few statutory provisions. However even in those circumstances the prosecution retains the mandate of disproving the innocence of an accused at all material times. See the principles in the famous Landmark case of **Woolmington v DPP {1935} AC 462 and Miller v Minister of Pensions {1947} 2 ALL ER 372 – at 373**

In the instant case therefore, it's the duty of the prosecution to prove the following elements of the offence:

- (a). The death of the deceased.*
- (b). That the death was unlawfully caused by an act of omission.*
- (c). That in causing death, the accused person was actuated with malice aforethought.*
- (d). That positive evidence places the accused at the scene of the murder.*

The evidence before this Court from **(PW1)** and **(PW2)** shows that prior to the killing of the deceased a daughter of the accused had been taken ill. Before long the daughter passed on while undergoing treatment and the neighbours suspected that her death had a relationship of being bewitched by the deceased. As an act of revenge on 26.9.2015, the members of the village went for the deceased whom they inflicted fatal injuries.

There is additional evidence **(PW2)** and **(PW3)** that though they confirmed that the deceased was assaulted to death, none of them witness the commission of the offence. The Court further heard from **(PW4) – Furaha**; who testified to the effect that on 24.9.2015 she left her matrimonial home to visit her parents, and participate in a burial at the accused home. Thereafter, **(PW4)** told the Court that left the burial ceremony for her matrimonial home. On her way she passed through her friend Christina's house. That is the same place she also met the deceased whom they served some food. Further **(PW4)** testified that at the spur of the moment, she saw the in laws to the accused looking for the deceased. Given the fact that the deceased suffered from a fractured limb, they dragged him forcibly from the compound, promising to return him safely back home.

It was stated further that soon thereafter screams rent the air only to confirm that the deceased had been assaulted and his body set on fire.

Incidentally, **(PW4)** gave evidence that she did not manage to be in close proximity to the scene of murder. On cross examination, the witness confirmed the persons of concern who picked her father as one **Juma** and **Wialu**.

It is trite that for the accused to be convicted of the offence of murder contrary to Section 203 of the Penal Code evidence led by the prosecution must establish existence of malice aforethought besides an unlawful act or omission. When it comes to malice aforethought, Section 206 of the Penal Code provides inter alia as follows:

- “Malice aforethought shall be deemed to be established by the evidence adduced proving any of the following circumstances.***
- (a). An intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not.***
 - (b). knowledge that the act or omission causing death will probably cause the death of a grievous harm to some person.***
 - (c). Whether such person is the person actually killed or not, although such knowledge is accompanied by indifference.***
 - (d). Whether death or grievous bodily harm is caused or not or by a wish that it may be caused.”***

In deciding whether the accused prosecuted an unlawful act or omission accompanied with malice aforethought it has to be a matter of proven facts and not conjecture. This can be established by direct or indirect evidence.

Incidentally, the prosecution in this case depended entirely upon the evidence of **(PW1)**, **(PW2)**, **(PW3)** and **(PW4)** which the Court finds to be both direct and circumstantial evidence. According to **(PW1)**, the deceased while under threat of being attacked on mistaken believe of practicing witchcraft against the accused daughter was brought to that bereaved family by one **Juma** and other persons not positively identified to the Court. Whereas **(PW3)** denied seeing the accused at the scene where the deceased body was set on fire.

In the same circumstances, **(PW4) – Furaha** testified to the effect that when screams on the death of the deceased came through soon after being picked by two men namely **Juma** and **Winchi**. To the best of his knowledge, the accused was not part of that gang who participated in the life threatening events against the deceased. This evidence places the current case on the first to be a joint enterprise of two men not

before Court.

There is no question from the elements of the offence and the evidence offered by the prosecution, clearly the deceased death was unlawfully caused accompanied with the requisite malice aforethought.

As has been pointed out by (PW1), (PW2), (PW3) and (PW4) in that particular incident in adherence to the ordinary meaning of positive identification of persons involved in committing the heinous crime, accused happened not to be at that scene.

Here in my view the circumstances of the offence fail within the ambit of Section 203 of the Penal Code but the person charged has not been proven to be the principal offender or an accessory before or after the fact in causing the death of the deceased. The accused at the trial ran cut throat alibi defence. Admittedly, there was no iota of evidence adduced also by the prosecution to fully place him at the scene.

This case and its facts is consonant with the privy council decision in **Von Starck v The Queen {2001} 1 WLR 1270** in which it council held:

“If the evidence is wholly incredible or tenuous or uncertain, that no reasonable jury could reasonably accept it, then of course the judge is entitled to put it aside and acquit the defendant.”

Similarly, in the case of **Dickson v R {1961-63} ALR 252** The Court held:

“Where the evidence is circumstantial, the accepted and logical approach is by way of elimination, that is by negating all possible hypothesis of innocence. Where the evidence is circumstantial, and if all facts relied on by the prosecution are capable of innocent explanation, a mere allegation of separate facts all of which are inconclusive in that they are as consistent with innocence as with guilt, has no probative force. In order to justify from circumstantial evidence an inference of a guilt, the facts must be incompatible with innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The burden of proving facts which justify the drawing of these inferences from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused.” (See also our very own decisions **Abanga alias Onyango v R CR Appeal No. 32 of 1990**, **Simon Musoke v R {1958} EA75**).

A critical appraisal of both direct and circumstantial evidence fails to link the accused person to the assault on the deceased, being a continuous inflicting of harm including sectioning the whole body on fire as established in the postmortem report exhibit 1.

On the evidence before this Court, the conduct of the accused person is synonymous with innocence. Thus, it would be wrong for any Court of Law to convict him of an offence which he has not been found guilty of any of the elements prescribed by the legislature under Section 203 of the Penal Code.

Its my finding therefore, that the prosecution has failed to prove the charge of murder against the accused person beyond reasonable doubt. To that extent he shall be acquitted and set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 18TH DAY OF OCTOBER 2021

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R. NYAKUNDI

JUDGE

In the presence of:

1. Mr. Gicharu for the accused person
2. Mr. Mwangi for the DPP