



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MALINDI  
CRIMINAL CASE NO. 11 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

FARAJ KINGI BAHATI .....1<sup>ST</sup> ACCUSED

ROBERT KINGI KOMBE .....2<sup>ND</sup> ACCUSED

Coram: Hon. Justice R. Nyakundi

Mr. Alenga for the state

Ms. Chepkwony advocate for the accused persons

JUDGMENT

The two accused persons **Faraj Kingi Bahati** and **Robert Kingi Kombe** hereinafter referred as the first and second accused respectively are each charged with the offence of murder contrary to Section 203 and 204 of the Penal Code.

The two accused persons pleaded not guilty. In brief the charge alleges that on 24.6.2017 at Kavinautu village Kaembeni, Sub-Location in Ganze, jointly with others not before Court murdered **Nelson Kiti Mwakuni Dava**. In an effort to prove their case its on record that five witnesses were submitted by the prosecution.

Among the witnesses was **PW2 – Haa Ngao** who told the Court that on 24.6.2017 – he was present when the accused persons in possession of petrol and matchbox set the deceased body on fire. Thereafter the locational Chief was telephoned who in turn called in the police to visit the scene.

The next person to testify on behalf of the prosecution was **Jacob Thoya (PW3)** who testified that on 24.6.2017 on or about 5.00 pm, the 1<sup>st</sup> accused went to his house to report that earlier on they had arrested a thief of their farm produce. He then requested that **(PW3)** accompany him to visit the deceased. Further **(PW3)** informed the Court that without notice he saw the accused enter the deceased house drag him out to the farm. It is at the farm they came with petrol and a match box to set ablaze his body. Later on the deceased succumbed to death with the severe burns.

**(PW4) Ronald Kitavi** the Assistant Chief testified that on 24.6.2017 he received a report about the death of the deceased from the clan elder. He went to the scene where he was shown the farm the deceased was allegedly stealing the maize. Further in **(PW4's)** evidence at the scene, he saw the burnt body of the deceased, the 1<sup>st</sup> accused armed with a panga while the second accused was in possession of a bottle with petrol inside. **(PW4)** acknowledged witnessing the accused acts of setting the deceased on fire. He tried to restrain them from committing the dangerous act but that did not save the life of the deceased. That is how he decided to telephone the police station to come to their rescue.

**(PW5) No. 23178 Chief Inspector Raymond Maler** testified that he investigated this murder incident which occurred at Kaembeni involving the deceased. During the inquiry **(PW5)** told the Court that it was alleged that the deceased was found on 24.6.2017 by the accused persons stealing their maize from the farm. On arrival at the scene. **(PW5)** stated that he confirmed the death of the deceased which he documented by taking photographs. He was also able to observe serious physical injuries on both the upper and lower limbs. It was also the evidence of **(PW5)** that the body was collected from the scene and a post-mortem examination conducted by **Dr. Juma** of Kilifi Hospital Mortuary.

As far as the post-mortem examination report is concerned, the same was produced as an exhibit by **Dr. Kaeruri (PW1)** on behalf of **Dr.**

**Juma. (PW1)** stated that on examination the deceased was found to have suffered burns on the head and face, deep cut on the left buttocks, shoulder, the right lower lobe of the lungs. It was opined by the medical evidence that the cause of death was penetrating injury to the right lung.

At the close of the prosecution case, each of the accused person was placed on his defence. The 1<sup>st</sup> accused told the Court that in the night of 23.6.2017 there was a report on the alleged theft of his farm produce. He decided to keep vigil to guard off any of the thieves who might attempt to steal the maize.

The accused indicated that at about 12.00 am he heard some movements within the farm and close pursuit he identified a human being. As he walked towards the person he ran away while carrying a sack of maize. According to the accused he made attempts to catchup with the suspect but his efforts did not bear fruits. However, (DW1) told the Court that he was joined in the chase of the suspect by the second accused. Nevertheless, in (DW1) evidence the suspect managed to disappear into the nearby forest. Further, accused stated that in the morning he reported the theft incident to the clan-elder and the Assistant Chief of the area was also informed of it as well.

On that basis the clan elder (PW3) in company of the deceased visited the same farm. (DW2) testified that at the scene, the deceased was interrogated on the allegations of theft of maize, but no tangible evidence came out. According to (DW1) together with the second accused they opted to make a complaint to the police station. That while on board the motorbike to the police station, they received a message that the deceased has been beaten to death. He denied being at the scene when the assault against the deceased took place.

On the other hand, when it came to the time of the second accused, he also denied the charge of murder as alleged by the prosecution.

(DW2) told the Court that on the material day, it was the 1<sup>st</sup> accused who went to the farm to guard it against theft of maize.

According to the testimony of (DW2), it was on or about 2.00 a.m. when he heard screams calling thief, thief. He therefore followed the screams and when he came in contact of the 1<sup>st</sup> accused he learnt that there was a suspect who had stolen the maize. The accused next contention was to the effect that they both decided to ride a motorcycle in order to report the matter to the police station. According to the accused evidence the death of the deceased occurred while on their way to the police station. He denied being at the scene of the crime.

### **Analysis and Determination**

In this trial, the case raises the following issues for determination whether the prosecution has discharged the burden of proof against the accused persons for the charge of murder contrary to Section 203 as read with Section 204 of the Penal Code.

It is trite that the duty of the prosecution is to prove the guilt of each of the accused persons beyond reasonable doubt. The burden on the standard of proof is a matter of evidence to disapprove the innocence of an accused persons who has been charged with a criminal offence therefore as expressly stated in Section 107, 108 and 109 of the Evidence Act, the prosecution has the burden to prove the existence or non-existence of any fact underlying the indictment against the accused persons. It's for the prosecution to prove both the intention and the unlawful act of murder beyond reasonable doubt and that burden never shifts to the accused person at any one instant. **(See the principles in Woolmington v DPP {1935} AC 465, R v Nyambura & others {2001} KLR 355, Kyengo v Uganda {2005} 2 EA 106, Mbuthia v R {2010} 2 EA 311).**

In a charge of murder contrary to Section 203 of the Penal Code, the prosecution duty is to proof beyond reasonable doubt the following elements:

- (1). The death of the accused.**
- (2). That his death was unlawful.**
- (3). That in causing death, the perpetrators did so with malice aforethought.**
- (4). That the accused persons participated in the commission of the crime with which they are charged.**

It remains now to decide whether on the facts presented the Court can draw an inference that the accused persons are guilty of murder. To that extent I propose to deal with the above ingredients one after another on both the standard of evidence and, presumptions on circumstantial evidence of the prosecution.

#### **(a). Death of the deceased**

The evidence adduced by the prosecution witnesses (PW1), (PW2), (PW3) and (PW4) proves that **Nelson Kiti Mwakuni Dava** died on 24.6.2017 the aspects of the evidence is consistent with the principle that proof of death is usually through medical evidence **(See R v Cheya & Another {1973} EA 500)**. The body of the deceased was also identified by **Harun Dava** and **Harrison Kiti Mwakuni** as stated in the post-mortem report **(exhibit 1)**. Also in the defence accused persons do not dispute the death of the deceased.

The next issue to be considered is that of whether the deceased death was caused by an unlawful act or omission to render the prosecution to prove it within the scope of Section 203 of the Penal Code.

According to the evidence of (PW2), (PW3) and (PW4), the accused persons on the 24.6.2017 were armed with a panga, a bottle of petrol and a match box inflicted deep cut wounds on the upper limbs of the deceased body and thereafter set his body on fire. In the testimony of

**(PW1) Dr. Kairwfi** who produced the post-mortem report the multiple wounds to the buttocks, shoulder, right lower lobe of the lungs contributed to the cause of death of the deceased. I accept the evidence of **(PW2)** and **(PW3)** that they saw the deceased being assaulted under mistaken belief that he was a thief of maize produce from the 1<sup>st</sup> accused's farm.

The facts of this case raised an issue of defence to property as an excuse for the murder. The defence of self or property is provided for under Section 17 of the Penal Code. In **Selemani v R {1963} EA 442 the Court of Appeal for Eastern Africa** stated as follows on the general guidelines on self defence:

**“If a person against whom a forcible and violent felony is being attempted repels force by force and in so doing kills the attacker, the killing is justifiable, provided there was a reasonable necessity for the killing or an honest belief based on reasonable grounds that it was necessary and the violence attempted or reasonably apprehended from the attacker is really serious.”**

According to the requirements of private defence under Section 17 of the Penal Code, one acts lawfully if force used to avert a prohibited attack by another person on the life, property or any other legally protected interest of the person himself or that of somebody else. For to be excusable the unlawful attack against self or property must have already committed or be impending. The defensive act contemplated by the accused must be proportionate to the attack.

In the instant case, the 1<sup>st</sup> accused claimed that his maize was under imminent danger of being stolen. It soon became apparent and necessitating to guard against the occurrence of the felony and hold the suspects accountable.

Curiously, the accused in his defence alleged that he came face to face with the suspected thief but he took flight before he could apprehend him together with the sack of maize in his possession. This means that the accused did not have the opportunity to assault the deceased as alleged by the prosecution witnesses. It is clear from the accused defence that there were no threats to his person or co-accused.

On the prosecution account from the evidence of **(PW2)**, **(PW3)** and corroborated by **(PW4)**, the accused persons had armed themselves with a panga and a bottle of petrol and a match box which they used to inflict deep cut wounds and burns upon the body of the deceased. It later transpired that the deceased succumbed to death from these injuries. There was a mistakenly belief that they acted in self defence, although they avoided to raise that defence to property in their defence. Weighing the evidence by the prosecution and the accused's defences their actions to assault the deceased with a panga and thereafter set his body on fire by use of petrol remains wrong and without any justification.

It is however clear in all circumstances and scenarios under Section 7 where no danger to bodily harm exists, to kill a robber or a thief, only to defend property, from being stolen may not be justifiable and if it be used, the force must be corroborate with the danger. In the instant case, the defence to defend property from being stolen could not raise any doubt that the death of the deceased was unlawfully caused by deliberate acts of assault.

Given the above background, I now proceed to establish whether the deceased killers had malice aforethought within the meaning of Section 206 of the Penal Code. In deciding whether, this murder was committed with malice aforethought, the Law envisages proof intention to kill, or to do grievous harm or knowledge that the act or omission will cause death. What then are the inferences and manifestations on whether the prosecution has proved malice aforethought.

In the cases of **Tubere S/o. Ochen {1945} 12 EACA 63:**

**“the surrounding circumstances of the charge and evidence ought to show the nature and gravity of the injuries inflicted, the nature of the dangerous weapon used, parts of the body targeted, the conduct of the accused before, during and after the offence.”** (See also **Ernest Asami Bwire Abanga alias Onyango v r Nairobi CRCRA No. 32 of 1990, Morris Aluoch v R CACRA No. 47 of 1996, Karani & 3 others v R (1991) KLR 622**)

Then comes the vital question relating to the prosecution case. In the case before me now, there is evidence of **(PW2)**, **(PW3)** and **(PW4)** to establish that the accused persons in killing the deceased were motivated with malice aforethought. According to **(PW2)**, **(PW3)** and **(PW4)** each told the Court that the accused persons took the deceased away from his house to the alleged maize farm. They placed him on the ground while already having suffered bodily harm. Further **(PW2)**, **(PW3)** and **(PW4)** testified that by taking the body to the farm, it was meant to show that the deceased was assaulted while in the process of committing a felony of theft of maize.

Whereas, in the real sense his injuries were inflicted elsewhere and the latest scene was a stage managed to accord them the defence of self or property. It is also worthy to state that from **(PW2)**, **(PW3)** and **(PW4)** the 1<sup>st</sup> accused was armed with a panga while the second accused came with a bottle of petrol and a match box.

The accused persons simply did inflict the deep cut wounds and subsequent use of petrol to set the body of the deceased on fire. It followed that when **Dr. Juma** conducted the post-mortem examination the deep cut wounds and burn injuries seen by **(PW2)**, **(PW3)** and **(PW4)** were all consistent with the post-mortem examination report produced in evidence as an exhibit 1 by **(PW1) Dr. Kairuri**.

**(PW5)**, the investigating officer gave evidence that when he visited the scene he was able to observe the injuries which he also documented by taking the photographs admitted as *exhibits 2*. The accused persons attempted to discredit the prosecution case by raising an alibi defence but that part of the case against them remained watertight.

In all the circumstances of this case, this is an open and shut case of murder committed with malice aforethought in the deceased house and during the fatal assault at the farm of the accused persons. There is the prosecution evidence for drawing that inference that the accused

persons committed the offence of which they were arraigned. It appears to the Court that on examination of the evidence with the greatest care on recognition in so far as the evidence of (PW2), (PW3) and (PW4) on the incident in the home and the farm, is concerned as they positively recognized the accused persons on identification of the accused persons, I draw inspiration from the principles in the case of **Waithaka Chege v R {1979} EA 271, Simiyu v R {2005} 1 KLR 192** that crucial evidence on to recognition of the accused persons in connection with the commission of the offence in this trial is that of (PW2), (PW3) and (PW4). Its categorical and their testimonies demolishes the alibi defence put forth by the accused persons that they were not at the scene.

In conclusion, its consistent that the unlawful acts of the accused persons caused the death of the deceased. That however does not end there, the conspiracy, and a common intention to commit the murder in furtherance of the unlawful acts brings the case within the statutory framework of Section 206 of the Penal Code on malice aforethought. In the premises I find each of the accused guilty of the offence and do convict them of murder contrary to Section 203 of the Penal Code.

#### **Sentence**

The convicts herein have already been convicted for the offence of murder contrary to Section 203 of the Penal Code. Following the Apex Court dicta in **Francis K. Muruatetu v R** mandatory death penalty was found to be unconstitutional. The grounds advanced by the Court prior to exercise of discretion revolve around mitigation and aggravating factors in **R v Nkloma Case No. 3 of 1996** the Court held:

**“It is not proper that the Court, to achieve any of the purposes of sentencing, retribution, deterrence, incapacitation, reformation and rehabilitation should compromise principles of sentencing, principles of sentencing are different from purposes of sentencing. Normally the purposes of sentencing do not assist the Court in arriving at the appropriate quantum of a sentence. An appropriate sentence must achieve proportionality, equality and restraint. The sentence must be equal to the crime committed, ensure the offences of equal culpability are treated alike and must not connote vengeance.”**

In the instant, it’s perfectly that the aggravating factors on the seriousness, gravity of the offence, the premeditation of it to execute it without any regard to the sanctity of life outweighs the mitigation of the convicts being first offenders or purporting to show regret for the responsibility of their unlawful acts of omission. I will also take into account that the accused persons have been in remand custody until 27.4.2018 when their bail terms were processed. For the two accused persons I find no extenuating circumstances to warrant a lesser custodial sentence. The fatal injuries inflicted were cruel and uncalled for in the first instance.

With regard to sentence, I impose a custodial sentence of 28 years with effect from 27.4.2018. 14 days right of appeal explained.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 22<sup>ND</sup> DAY OF DECEMBER,2021**

.....

**R. NYAKUNDI**

**JUDGE**

**In the presence of:**

1. Mr. Mwangi for the State
2. The Accused person