



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**CRIMINAL CASE NO. 20 OF 2020**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**SAFARI KATANA LUGO alias RASTA MUGINA.....ACCUSED**

**Coram: Hon. Justice R. Nyakundi**

**Mr. Mwangi for the state**

**Ms. Mona advocate for the accused person**

**J U D G M E N T**

The accused person in this case was charged with the offence of murder contrary to Section 203 and 204 of the Penal Code. It is alleged that the accused on 5.3.2020 at Mrima village murdered **Kazungu Lugo Fondo alias Chifu Mwangi**. He pleaded not guilty and the burden of proof of beyond reasonable doubt vested upon the prosecution remained the only pathway to disprove his innocence.

During the plea, accused denied the offence. In terms of Article 50 (2) (4) of the Constitution accused right to counsel was actualized by the state in which **Ms. Mona advocate** appeared on his behalf at the trial. In support of the ingredients of the offence, it is clear from the record, that seven (7) witnesses volunteered to give evidence on behalf of the state as against the accused. In the matter according to the evidence of **(PW1) – Raymond Salim Masha, (PW2) – Bahati Charo** stated that on the 5.3.2020 they saw the accused person armed with a stone which he used to hit the deceased on the head. It is from that act of assault stated **(PW1)** and **(PW2)** that the deceased suffered serious injuries to the forehead and left parietal occipital region. This was confirmed by **Dr. Ruth Nyangi (PW4)** a pathologist based at Kilifi Level 5 hospital who on conducting a postmortem examination identified the deceased to have suffered fracture of the linear skull, left forehead, left parietal occipital subdural, chest sternal bone. Considering the medical findings, **(PW3)** opined that the cause of death was due to head and chest injuries accompanied with blunt force trauma.

It is also discernible from the evidence of **(PW6) – Kitsao Nguma** that on the material day, he saw the accused arm himself with a stone which hit the deceased at the chest and on the head. In the same evidence led by **(PW6)** told the Court that a report was made to the police who executed an arrest of the accused without a warrant. By the investigations conducted on the incident by **Sgt. Martin Wanjana (PW7)**, he attached the motive of the crime to suspicion on witchcraft against the deceased.

It is apparent from the evidence of **(PW7)** that the accused person formed the intention of revenge against the deceased following the sickness of her daughter who allegedly was diagnosed of diabetes. In this context, **(PW7)** testified that the accused while armed with a stone did assault the deceased severally as certified by the pathologist in her postmortem.

At the close of the prosecution case, the real question of Law was whether evidence adduced was sufficient to support proof a prima facie case against the accused.

In his defence the accused elected to state the defence in a rebuttal to the prosecution case by means of sworn evidence. According to the accused on 5.3.2020, while at home, his sister **Diana** went to his home so as to inform him about the death of **Kanze**; but failed to state the circumstances surrounding the death. As the murder happened while the accused was in Mombasa he had to travel back home to establish who must have killed the deceased.

Further, the accused testified that on arrival at home he found the deceased surrounded by a mob. That the conflict was between two warring families, but denied any wrong doing or being a member of the gang allegedly involved in the death of the deceased.

**Determination**

Having considered both the prosecution and defence case, its now time to rule on two fundamental issues namely:

- (1). The nature of the burden and standard of proof of beyond reasonable doubt in the murder of the deceased expected of the prosecution.**
- (2). Whether the essential ingredients for the offence of murder contrary to Section 203 were proved beyond reasonable doubt as required by Law; against the accused as the key perpetrator.**

**(a). Issue No.1**

It is trite that once the accused person pleads not guilty to the charge, in all criminal cases, the prosecution bears the burden of proving the crime against each of the set ingredients beyond reasonable doubt. This is as expressly stated under Section 107 (1), 108 and 109 of the Evidence Act on prove of existence or non-existence of particular facts to the commission of crime in order to obtain Judgment in its favor. That burden never shifts to any of the accused charged and it therefore remains that his or her conviction is to be based on the strength of the prosecution evidence. The accused bears no responsibility to prove his or her innocence. The answer to this question is simple those who commit crimes against other human beings or their property should be convicted and punished. It also follows that those who do not commit any offence should be acquitted. Most widely quoted maxim is by **William Blackstone's Law Dictionary Reprint 1978 9<sup>th</sup> Edition**:

***“That it is better that ten guilty persons escape, than one innocent suffer.”***

The expression “*proof beyond reasonable doubt*” found its definition and typical approach in the cases of **Woolmington v DPP {1935} AC 462, Miller v Minister of Pensions {1947} ALL ER 373**. The instructive message in both these cases is such that proof beyond reasonable doubt is not a possible doubt, a speculative, imaginary or forced doubt but one which is abiding verdict of guilty, after considering the evidence, in totality to place the accused at the scene as the person who committed the offence.

This conceptual framework forms the necessary standard of proof that must be discharged by the prosecution for a conviction to ensue. These components consist of the burden of proof and evidential burden which duty is clearly enunciated by **Fidelis** in his book **Modern Nigerian Law of Evidence, University of Lagos Press, Lagos {1999} 379** as follows:

***“The term Burden of Proof is used in two different senses. In the first sense, it means the burden or obligation to establish a case. This is the obligation which lies on a party to persuade the Court either by preponderance of evidence or beyond reasonable doubt, that the material facts which constitute his whole case are true, and consequently to have the case established and Judgment given in his favour. The other meaning of the expression burden of proof is the obligation to adduce evidence on a particular fact or issue. This evidence in some cases, must be sufficient to prove the fact or issue to justify a finding on that fact or issue, in favor of the party on whom the burden lies. It is called the evidential burden. This is the sense in which the expression is more generally used.”***

Thus onerous task of proof of beyond reasonable doubt by way of direct or circumstantial evidence rests with the prosecution and the fact accused is put on his or her defence does not shift that burden and standard of proof, in any way.

So what are the remarkable features of the evidence in this case as underpinned under the above doctrine against the accused that takes me to issue No. 2, of my discourse.

**(b). Issue No. 2**

The four main ingredients of the offence of murder contrary to Section 203 of the Penal Code to be proved beyond reasonable doubt include:

- (1). Death of a human being.**
- (2). The death was caused by some unlawful act, by the accused.**
- (3). That the stated unlawful act was actuated by malice aforethought.**
- (4). That in all circumstances it was the accused so charged who committed the crime of death.**

**(1). Death of the deceased**

In the instant case, on this element evidence of the post-mortem report by **(PW4) – Dr. Nyangi** of Kilifi Hospital shows that on 9.3.2020, the deceased body was examined as identified by **Shadrack Charo** and **Samuel Katana**. The postmortem report tendered in evidence as exhibit 1 found the deceased to have suffered serious injuries to the head, skull and forehead. There is no rebuttal from the defence on this issue of death. As a consequence, I find the prosecution having discharged the burden of proof beyond reasonable doubt that **Kazungu Lugo Fondo** is dead, aged 83 years old.

**(2). The death being unlawfully caused**

Our Criminal Law recognizes the sanctity of life by prohibiting the unlawful killing of another human being as entrenched in Article 26 of the Constitution. The generic term homicide covers offences such as murder, manslaughter and or causing death by dangerous driving.

What distinguishes one after another is the mensrea or malice aforethought element of the accused alleged to have committed the offence.

Under Section 203 of the Penal Code, whether killing of another human being is unlawful is an important ingredient of the offence. The consideration of this element is determined by reference to causation issues in Section 213 of the Penal Code. In that the accused conduct must actually be demonstrated to have been the *Sine Qua non* (but for) test in the deceased death.

At the trial, the burden is on the prosecution to prove causation issues; that the accused conduct occasioned the life threatening event upon the deceased. The general test to be applied in order to establish causation in Law is whether the accused act did accelerate the deceased's death to an extent that is more than merely negligible. It is to be noted that the accused unlawful act does not necessarily need to be substantial cause of death. If the accused struck the deceased with a weapon or article, or force instrument manipulated to inflict serious harm, and the deceased decides not to seek medical treatment, and from the injuries he or she dies, the accused is presumed to have caused the death. In short, simply in Law the accused act has to be the significant contributing factor of the deceased death.

In the instant case, the prosecution had called the evidence of (PW1) and (PW2) to demonstrate that the deceased death was unlawfully caused. There is no evidence from the defence that the use of excessive force against the body of the deceased was triggered by an act of self-defence to self or property. From (PW1) and (PW2) testimonies, the deceased was assaulted by the accused who armed himself with stones. He used the same stones to inflict serious harm targeting the head and forehead of the deceased. The admitted evidence of (PW1) and (PW2), was also corroborated by the postmortem report findings as captured by Dr. Nyangi (PW4) in her evidence. The evidence of the pathologist shows the deceased who sustained lacerations on the left forehead measuring 7 x 8 cm, linear skull fracture, extending to the frontal area, left injury subgaleal hematoma, right, left parietal occipital subdural injury accompanied with hemorrhage. It emerged as opined by (PW4) that the cause of death was head and chest injuries due to blunt force trauma. This threat and use of deadly force against the deceased was witnessed by (PW1) and (PW2) on the material day of the crime.

It is therefore sufficient to make a finding that the prosecution has discharged the burden of proof of beyond reasonable doubt of the death being unlawful.

**(c). Malice aforethought as a distinct element for the offence of murder.**

The logical construction and interpretive of malice aforethought is demonstrated by the approach provided for under Section 206 of the Penal Code. Given the definitional conceptual framework, malice aforethought is satisfied in several ways including proof of intent to cause the death of another human being, or to do grievous harm or the seemingly clear notion of knowledge that could provide a reasonable basis for a belief that the accused intended to injure or kill the deceased by use of deadly force. Whether the accused acted with this mental state is a factual matter for the prosecution to prove beyond reasonable doubt. **Blackstone in a portion of his treatise published in 1769** wrote,

*“Express malice is when one, with a sedate deliberate mind and formed design, doth kill another, which formed design is evidenced by external circumstances discovering that inward intention; .... Neither shall he be guilty of a less crime who kills another in consequence of such a willful act as shows him to be an enemy to all mankind in general; as going deliberately, and with an intent to do mischief, upon a horse used to strike, or coolly discharging a gun, among a multitude of people.”*

The test is that of a reasonable man as underscored by C. J. Goddard in a Judgment delivered in the **Ward case {1956} 1 QB at 352-53**:

*“Of course, the test must be applied to all alike, and the only measure that can be brought to bear in these matters is what a reasonable man would or would not contemplate. If the act is one as to which the jury can find that a reasonable man would say: “It would never occur to me that death would result or grievous bodily harm would result,” then the jury can find him guilty of manslaughter; but if the jury come to the conclusion that any reasonable person, that is to say, a person who cannot set up a plea of insanity, must have known that what he was doing would cause at least grievous bodily harm, and the death is the result of that grievous bodily harm, then that amounts to murder in law and a verdict of murder is justified.*

In this regard evidence to be sought by the Court is proof showing that the accused formed the necessary malice aforethought before committing the crime or during the unlawful acts of inflicting serious harm. It's also a yardstick for the prosecutor to prove by demonstrating that the accused took certain steps to facilitate the murder of the deceased.

Given those guiding principles, in this case, (PW1) and (PW2) testified to the effect that the accused armed himself with stones which he pelted the head of the deceased. The natural consequences of the accused's behavior were dangerous to the deceased's life. He knew of these dangers and he still continued to act and did so with conscious disregard to human life. Additionally, in the accused's premeditated and deliberate acts, he targeted the vulnerable parts of the body, being the head, resulting in the death. There is no evidence that the killing was committed in self-defence or defence of others as envisaged by Section 17 of the Penal Code.

The circumstances in this case which qualifies malice aforethought include the nature of the weapons used, the part of the body injured, the serious multiple injuries inflicted and the conduct of the accused before, during and after the aforesaid crime. **(See Tubere v R {1945} 12 EACA 63)**. The evidence in the postmortem report exhibit 1 indicates that the deceased sustained serious injuries. On examining the extent and nature of the injuries, (PW4) opined the cause of death to be head and chest injury due to blunt trauma.

As already stated by the prosecution, all these circumstances indicate an accused person who persistently assaulted the deceased. Indeed, there is evidence to show that the unlawful conduct of assault was perpetuated with malice aforethought.

For these reasons, I am of the considered view that the prosecution has discharged the burden of proof on existence of malice aforethought in the killing of the deceased.

As regards identification of the accused, I rely on the guiding principles in **R v Turnbull {1976} 1 ALL ER**. It is to test the evidence of **(PW1)** and **(PW2)** in which the identification of the accused was made to place him at the scene. The lingering questions to the facts of the case in particular include: For how long did the witness have the accused under observations? At what distance? In what light? Was the observation impeded in anyway, such as by passing traffic or a press of people.

Had the witness ever seen the accused before or how often? Which time elapsed between the observation and subsequent identification to the police? Were there discrepancies between the initial description given by the witnesses and the actual description of the accused.

This case was hinged on the identification evidence of **(PW1)**, **(PW2)** and **(PW6)** respectively. The genealogy of the events and identification of the accused are laid bare that on 5.3.2020, in broad daylight the accused was at the scene of the murder. This was corroborated by **(PW2)** and **(PW6)** as to the accused's involvement in the murder, the type of weapons he carried and the description of his identity as the culprit. The accused physical view was never obstructed or impeded in anyway to deny the witness, a positive recognition. The three witnesses **(PW1)**, **(PW2)** and **(PW6)** evidence was never shaken by the defence. Therefore, there were no discrepancies to discredit the veracity and truthfulness of the evidence in reference to recognition of the accused having been involved in the murder.

In the present case, its logically logical to conclude that the recognition of the accused is not a fabricated story by the witnesses. It is a case of sound evidence that goes to satisfy the criteria of consistency and credibility to proof the accused being at the scene and perpetrator of the murder, beyond reasonable doubt.

As to accounts given by the accused on alibi defence, it's merely a rebuttal which is inconsistent with the evidence of **(PW1)**, **(PW2)** and **(PW6)** on the incident. The entire episode, as to time, day and month squarely places the accused at the scene. The alibi defence was never supported with cogent and specifics of evidence to controvert the prosecution case on recognition. Notwithstanding, the alibi defence by the accused, its crystal clear that the prosecution discharged fully the burden of proof on recognition to rule the case proved beyond reasonable doubt in their favor.

As a consequence, I find the accused person guilty as charged for the offence of murder and do therefore convict him as per the Law established.

#### **Sentencing verdict**

In Kenya, the procedures and relevant considerations for imposing sentence pursuant to Section 204 of the Penal Code is anchored in the **Supreme Court** decision of **Francis Muruatetu v R {2017} eKLR**. The Court provided a yardstick of what features constitutes mitigation and aggravating factors. I have heard both the convict and the prosecution for the state on these issues during the sentencing hearing while mitigation factors of the convict remained limiting to outweigh the aggravating factors of the offence broadly thus was an heinous crime. It involved depravity of mind at the time of assaulting the deceased. If mitigation given is accepted to reduce the sentence which is incompatible with the letter and spirit of Section 204 of the Penal Code.

In this specific context the ramifications of the offence calls for a deterrence sentence chosen to punish crime for those found culpable. The net result is that of passing a sentence of thirty (30) years imprisonment against the convict. Giving effect to the provisions of Section 333 (2) of the Criminal Procedure Code that sentence takes effect from 13.8.2020.

It is so ordered. 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