



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL CASE NO. 7 OF 2015

REPUBLICPROSECUTOR

VERSUS

DAMA KAZUNGU.....1ST ACCUSED

ANDERSON MULEWA.....2ND ACCUSED

JIMBI JEFFA KAREMA3RD ACCUSED

AMANI NGALA..... 4TH ACCUSED

MWALIMU KAINGU JEFFA..... 5TH ACCUSED

RACHEL KAZUNGU 6TH ACCUSED

JEFFA KAZUNGU KAREMA.....7TH ACCUSED

Coram: Hon. Justice R. Nyakundi

Mr. Mwangi for the state

Mr. Michira advocate for the accused persons

J U D G M E N T

The accused persons are charged jointly with murder contrary to Section 203 as read with 204 of the Penal Code. It is alleged that on 6th February, 2015, at Roka village jointly with others not before Court accused persons murdered **Kazungu Jefwa Katana**. Following that trial the prosecution called a total of six (6) witnesses.

To start of the prosecution case, was the testimony of **(PW1) Charo Kihepe** testified that on 6th February, 2015 he was asked by his neighbor to go to their home to treat a patient by the name **Salama**. He readily agreed to walk to their home in company of his wife. On arrival **(PW1)** explained that they were many people including the deceased **Kazungu Jefwa**. He noticed that **Kazungu Jefwa** had suffered injuries on the nose and did lie down unconscious. That time he also decided to treat **Kazungu Jefwa** soon thereafter he was ordered to leave the homestead. Due to the threat, he was receiving from the people in the homestead he had to lodge a complaint with chief of the area **(PW4) Hudson Kithi Yaa**. According to **(PW1)**, he was later to be informed of the death of the deceased. On cross-examination, the witness denied identifying the accused persons assaulting the deceased. He only referred the incident of his assault to the police for further investigations to bring the culprits to account.

(PW2) – Sgt. Daniel Kimeu of Matsangoni Police Post testified that **(PW1)** and **(PW3)** reported an assault incident in which **(PW1)** sustained harm at the home of the deceased. The investigations showed that the 2nd accused was one of those involved in the assault of **(PW1)** on the material day.

According to **(PW3)**, while at their home with **(PW1)** the 1st accused and another by the name **Jora Kazungu** riding a motorcycle came for **(PW1)** at his homestead to go and treat the deceased but at they arrived, he was bleeding due to the injuries already inflicted by some people

at the home.

In a short while, **(PW1)** was ordered to leave the home with threats of dire consequences if the treatment fails. On reflection **(PW3)** told the Court that they decided to have the matter reported to the chief of the location **(PW4)**.

(PW5) – Dr. Zeinat Zahran a medical officer attached to Kilifi Hospital produced the postmortem report on behalf of Dr. Bachu in respect of the deceased which was carried out on 17th February 2015. According to **(PW5)** the examining pathologist found the deceased sustained multiple injuries to the tibia; fibula, left jaws, chest, fracture of the 1st, 2nd and 3rd rib of the chest wall. Fracture of the fibula bone. The doctor opined that the cause of death was due to hemorrhage secondary to head trauma.

(PW6) – PC. Machoka gave circumstantial evidence as to the death of the deceased and assault of the **(PW1)** who was forcibly taken to the home to offer treatment. **(PW6)** said that in the company of other police officers they visited the scene where he saw many people and the deceased **Kazungu Jefwa** already confirmed dead inside his house. **(PW6)** testified that he made arrangements to have the body of the deceased removed from the scene for the mortuary at Kilifi. According to **(PW6)**, on the evidence collected from the surroundings the accused persons were suspected to have played a role in the death of the deceased that was the time they were arrested and jointly charged with the offence of murder. The prosecution case was wholly depended upon these circumstantial evidence against the accused persons.

What was each of the accused answer? At the close of the prosecution case the accused persons were to be placed on their defence.

(DW1) – Dama Kazungu, the wife to the deceased told the Court that on 6th February 2015 the deceased was taken ill while at home. Many people from the neighbourhood some riding motor cycles happened to enter their compound. On cross-examination **(PW1)** testified that prior to that there was a cleansing ritual on claims of witchcraft which she did not attend. Next to offer his defence was **Anderson Kazungu**. He told the Court that on routine matters he occupies herself with the sale of coconut wine.

Further, **(DW2)** gave evidence that on the material day, he left Kilifi for Roka to visit one **Salama** his sister who was indisposed in company of other family members. **(DW2)** testified that they decided to escort **Salama** to the hospital. They happened to stay up to 8.00 a.m. as **Salama** received medical treatment and left soon thereafter for home. On arrival there were many people who had arrived with some riding motorcycles. One significant thing he saw was the assault upon the deceased apparently who also had succumbed to death. He denied that he participated directly or indirectly in causing the death of the deceased.

Next was **(DW3) – Jimba Jeffa Karema** who in his testimony denied the offence of killing the deceased. According to his evidence at the time of the alleged offence he was in the field tapping wine. On return from the winefield, he found many people surrounding the home with information, that the deceased is dead. Unfortunately, **(DW3)** told the Court that the deceased body had been collected from the home.

Next in line to give his defence was **Amani-Ngala**. From the testimony, she adduced that the deceased was her neighbor on the 6th February 2015 there were many people who responded to the said news of his death. He denied the charge as one of the assailants.

Next was the defence of **(DW5) – Mwalimu Kaingu** also of Roka village. He denied the charge of killing the deceased. Put simply in his defence while at home he received a telephone call on the death of the deceased. Last but not least was the Defence of **(DW6) – Rachel Kazungu**, she denied the offence as alleged by the prosecution that she participated in the killing of the deceased.

Finally, **Jeffa Kazungu** on oath gave evidence denying any involvement with the death of the deceased. In support of the defence **(DW8) Salama Kazungu** told the Court that her father passed on in circumstances she is not able to state clearly before this Court. The witness also told the Court that on 6th February 2015 she had been unwell and this prompted the family members who included **(DW2) – Mwalimu**, to escort her to the hospital. At the hospital she was diagnosed of malaria. She denied that the accused persons murdered the deceased.

On the same strength, **(DW9) Saida Katibi**, also denied the charge of the accused persons being alleged to be the perpetrators of the crime against the deceased. Further there was the evidence of **(DW10) Masha Baya**. His evidence was in support of the allegations made against his wife **Rachael Kazungu**. According to **(DW10)**, the accused Rachael on 6th February 2015 had left their matrimonial home for her parents. Further, in **(DW10)** evidence there cannot be any doubt that the accused was not at the scene in which the deceased died. **(DW11) Nelson Maesho** told the Court that in relation with **Mwalimu Jeffa** on the alleged day he worked at a food kiosk the whole day. That is where he received a telephone call that the deceased is dead.

Having considered the prosecution and defence case that has been adduced, I now proceed to determine one central issue whether the prosecution has discharged the burden of proof of beyond reasonable doubt.

Determination

It is settled Law that the accused persons having pleaded not guilty placed the burden of proof upon the prosecution to prove each ingredient of the offence beyond reasonable doubt. By virtue of Section 203 and 204 of the Penal Code the following elements must be proved by the prosecution for a verdict of guilty and conviction to ensue:

- (a). That the deceased died.**
- (b). That the deceased death was unlawful.**
- (c). That in killing the deceased, the accused persons did so with malice aforethought.**

(d). That the accused persons directly or indirectly participated in the commission of the crime.

Similarly, as espoused under Section 107, 108, 109 of the Evidence Act the burden of proof in Criminal proceedings is always on the prosecution throughout the trial of an accused person. The burden of proving that any person has been guilty of a crime or wrongful act, is subject to the provisions of Section 107 (i) and 108 of the Evidence Act. On the person who asserts it, whether the commission of such act is or is not directly in issue in the action. If the prosecution proves, the commission of a crime beyond reasonable doubt, the burden of proving reasonable doubt is shifted to the accused person. The requirement that the prosecution should have the immovable burden to prove the guilty is based on Article 50 (2) (a) of the Constitution that stipulates that every accused person shall be presumed innocent until the contrary is proved. This standard of proof has been affirmed in several cases including the landmark case of **Woolmington v DPP {1935} AC 462 and Mancin v DPP {1942}, Republic v Nyambura & Others {2001} KLR 355, Ali Ahmed Saleh v R {1959} EZ 654, Gupta v R {1983} KLR 381.**

The philosophy behind the burden of proof remaining with the state is one underpinned on the presumption of innocence.

“It is traditionally held in law that it is better that ten guilty men should escape than an innocent man should suffer.”

I have keenly considered the evidence on record and brief submissions of both counsels. The remarkable features of this case revolve around the sickness of **Salama** a sister to the accused persons. **Anderson Jimbi, Mwalimu** etc. It happened that on 6th February 2015 she had been escorted to the hospital. Apparently prior to that as deductible from **(PW1), (PW2)** and **(PW3)**, the same siblings to **Salama** had sought assistance from the herbalist to go and dispense medicine to her. That traditional healing happened to have proceeded under threats of violence by the accused persons. That episode nevertheless did not end there, accused persons had suspected their father, the deceased as the one who had bewitched **Salama** – their sister. The accused persons had also held him hostage as they suspected him of practicing witchcraft. There was therefore a clash between them and the deceased. The same day, the accused persons were struggling to have **Salama** healed either through conventional or herbal medicine, their father was under siege as a suspected witch. From the evidence adduced by the prosecution witnesses there are many people who went to the home of the deceased.

However, notwithstanding that scenario, there was useful evidence from **(PW1), (PW2), (PW3), (PW4)** that points to the deceased having suffered injuries. Consequently, a postmortem produced by **(PW5)** on behalf of **Dr. Ballu** who conducted the postmortem examination showed a victim who suffered serious multiple injuries. Essentially as observed by **(PW5)**, the deceased sustained grievous harm to the entire respiratory system, constituting rib-cage, fracture of the chest and the head. Although the accused persons described as falsehood their involvement with the death of the deceased, I notice the circumstantial evidence squarely ascertains the truth of the matter or and that the whole enterprise was planned and executed with their knowledge.

Since death is at the heart of the offence of murder contrary to Section 203 of the Penal Code I am satisfied that despite the confusion being created by the defence on alibi at the trial, one **Kazungu Jefwa Karema** is dead.

It is also worth noting that there is a casual link between the severe injuries detected by the pathologist **(PW5)** as captured in the postmortem examination report and the cause of death of the deceased. These connecting factors of injuries of the deceased which resulted in the death was unlawfully inflicted. In the chain of evidence by **(PW1), (PW2), (PW3)** and **(PW4)**, the motive of the murder of the deceased was the belief by the accused persons that he had a hand in the sickness of “**Salama**”. The evidence by the prosecution witnesses taken together with that of the defence shows a deliberate unlawful acts under the honest belief of the accused persons that their father possessed supernatural means which he unleashed to the family members. It is clear from the evidence of **(PW1), (PW2), (PW3)**, and **(PW4)**, that the accused persons and others not before Court consulted one **(PW1)** a medicine man to administer a portion of some medicine to **Salama**. In sum, it can be seen from the same evidence of the witnesses a situation arose in respect of the deceased. However, in the case of the deceased, accused persons choreographed the incident to avoid a direct accusation from the neighbours and other members of the family.

From the foregoing there is no dispute that a belief in witchcraft is not a reasonable mistake of Law to accord the accused persons any defence to the murder of the deceased. They cannot therefore rely on the defence of witchcraft to retaliate in striking the deceased to death. With regard to the extent on the death of being unlawful, I am of the considered view that the prosecution has discharged the burden of proof beyond reasonable doubt.

On the other hand, to prove murder the prosecution has a duty to lead evidence on malice aforethought. In answer to this ingredient one has to look at the definition under Section 206 of the Penal Code, under this Code:

“Malice aforethought is deemed to be established by evidence proving an inhuman to cause the death of or to do grievous harm to any person whether that person is the person actually killed or not. (b). knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not..... An intention to commit a felony.”

In our jurisdiction malice aforethought is the requisite mental state, a killer must have in order to be found guilty of murder contrary to Section 203 of the Penal Code. Whether or not the accused in a specific charge acted with malice aforethought is a question of fact for the Court to decide.

In the instant case, the prosecution established that the accused persons thought of killing the deceased under the belief that he is the one who bewitched **Salama**. The same day on the 6th January 2015 accused persons were last seen with the deceased severally inflicted harm on vital parts of his body as textualized in the postmortem examination report. From the evidence the acts by the accused persons can be summed up as unjustifiable, inexcusable and unmitigated that endangering state of mind.

Going by the principles in **Tubere S/o Ochen v R {1945} 12 EACA 63, Ernest Asami Bwire Abanga alias Onyango v R CACRA No. 32 of 1990, Morris Aluoch v R CACRA No. 47 of 1996.** With malice aforethought the accused persons committed the murder that can be

inferred from those surrounding circumstances. Whatever was done involved the natural and probable consequences of their unlawful acts. An ordinary man capable of reasoning would in the position of the accused persons could have foreseen death or grievous harm ensuring as the aftermath of that unlawful conduct.

It is on that basis I find that the death of the deceased was actualized with malice aforethought.

I should however point out that besides malice aforethought the prosecution case is also hinged on Section 20 and 21 of the Penal Code on principal/accessories to the offence and common intention. The intentional and unlawful acts were procured by each of the accused in conjunction with one another, and in the prosecution of that purpose committed the murder against the deceased. The question posed by the Section is whether in fact the nature of the offence was such that it is commission was a probable consequence of the prosecution of the common unlawful purpose and not whether the accused was aware that its commission was a probable consequence.

“In deciding whether or not the offence actually committed was a probable consequence of the unlawful purpose, there is no resort to the views of any person, ordinary, reasonable or otherwise. The matter is simply to be determined as a matter of fact, objectively.” (See Stuart v R {1974} 134 CLR 426)

The case is not settled until the prosecution evidence is tested on identification in **Simiyu v R {2005} 1 KLR 192** the Court of Appeal set out the guidelines on the approach to be taken in dealing with evidence of identification by eye witness in criminal cases likewise in the instant case on evaluating the evidence of both the prosecution and the defence alibi, the events leading to the arrest indictment are crystal clear. There is ample evidence from **(PW1), (PW2), (PW3)** and **(PW4)** on recognition of the accused persons being involved in the commission of the crime against the deceased.

I wish to note that the defence alibi did not create a reasonable doubt which could be resolved in favor of any of the accused persons. In conclusion, therefore I find the charge of murder contrary to Section 203 and 204 of the Penal Code proved beyond reasonable doubt. The upshot is that a verdict of guilty is entered and conviction of each of the accused jointly and severally in causing the death of the deceased.

Sentence

Following the convicts being found guilty combined with an order of conviction for the offence of murder contrary to Section 203 as punishable in terms of Section 204 of the Penal Code its now my singular duty to exercise discretion in passing the appropriate sentence.

In judicializing the sentence against each of the convicts, I heard from their respective counsel to consider, their ages, the fact that they are first offenders, and do regret the offence altogether. On the other hand the prosecution counsel urged this Court to factor in the circumstances of the offence and the set standards for the exercise of discretion to impose a custodial sentence. There is further analogical value drawn from the probation officer’s – pre-sentence report. The report presents the convicts personal circumstances, community ties and the victim impact statement. Here, the fundamental factor to keep in mind is that of the fitness or quantum of the sentence which is likely to meet the justice of this heinous crime against the deceased. The function of this Court is precisely that of balancing act between the competing public interest goals in sentencing with those of the convicts commonly known as mitigation factors.

In my opinion, the offence which I am about to pass sentence involves a violation of the right to life under Article 26 of the Constitution and its importance in preservation of loss of life in all circumstances unless authorized by Law. It is also important to remember, none of the convicts committed the aforementioned offence within the ambit of provocation in Section 207 as read with 208 of the Penal Code or in circumstances prescribed under Section 17 on self-defence. Therefore, their trial as concluded with a verdict of conviction for murder meant that their unlawful acts remained inexcusable or justified in causing the death of the deceased.

As a consequence, there is no ambiguity in absence of any meaningful mitigation the effect of the sentence substantially weighs on the aggravating factors. For those reasons, I sentence each of the convict to twenty six (26) years imprisonment with effect from 19.5.2015. The conclusions implies that the convicts have a right of appeal concerning the fitness of the conviction and custodial sentence imposed.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 20TH DAY OF DECEMBER, 2021

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R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Mwangi for DPP
2. The Accused persons