REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARSEN

CRIMINAL CASE NO. 02 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

JUMA TAKANO DHADHO.....1ST ACCUSED

YUSUF DHADHO JUMA.....2ND ACCUSED

Coram: Hon. Justice R. Nyakundi

Mr. Mwangi for the state

Mr. Gekanana advocate for the 1st accused person

Ms. Emukule advocate for the 2nd accused person

J U D G M E N T

On 2.1.2019 at Malakoteni village – Garsen town, **Osman Lila** met his death and the accused persons **Juma Takano Dhadho** and **Yusuf Dhadho Juma** were indicted of the offence of murder contrary to Section 203 as read with 204 of the Penal Code.

On being arraigned before Court each plead not guilty. That necessitated the prosecution to lead evidence to proof the charge beyond reasonable doubt.

According to the elements of the offence, the state must prove:

(a). The death of the deceased

(b). That his death was caused by an unlawful act or omission.

(c). That such a death was caused with malice aforethought.

(d). That the accused persons were positively identified as the perpetrators of the crime.

At the trial the 1st accused was represented by **Mr. Gekanana** whereas **Ms. Emukule** appeared for the 2nd accused pursuant to Article 50 (2) (4) of the Constitution.

The burden of proof and the standard of proof in criminal cases, the state bears the ultimate responsibility of proving each of the elements beyond reasonable doubt. In terms of Section 107 (1) of the Evidence Act,

> ***"Whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. When a person is bound to prove the existence if any fact it is said that the burden of proof lies on that person."***

The notion of this conceptual framework on the burden of proof is that for the Court to decide that all element or a single element of the crime exist against an accused person, the evidentiary effect of it must be beyond reasonable doubt. In **Woolmington v DPP {1935} A. C. 462,** the Court held that:

"Throughout the web of English Criminal Law, one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to the defence of insanity and subject to statutory exceptions, if, at the end of and on the whole of the case, there is a reasonable doubt, by the evidence given by earlier the prosecution or the prisoner as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal no matter what the change is the prosecution bears the burden of proof on every issue in a criminal case beyond reasonable doubt."

With this it means that in a trial of an accused where the inference is so strained as not to establish the issues beyond reasonable doubt, it is significant that he or she be acquitted forthwith. The measure of this may be both quantitative and qualitative. That easily lends itself to the existence or non-existence of facts in issue for the prosecution to secure Judgment against the accused. In a case of this nature, the concept of guilt is not a single entity, but is made up of a complex of elements. The sanctity with which the Law upholds the accused's right to innocence until the contrary is proved by the state is ring fenced by the Constitution under Article 50 (2) (a) of the Supreme Law of the Republic.

In the instant case, based on the five (5) prosecution witnesses, it's the state case as deductible from **(PW2)** testimony that the deceased was attacked in the night of 2.1.2019. The witness told the Court that initially she was awakened by the screams. On, visiting the exact scene, she inquired from the deceased who had inflicted the injuries he mentioned the name of the deceased. Soon thereafter, the deceased fell down and collapsed.

On cross-examination, **(PW1)** told the Court that the surroundings where the assault took place had some street lights making it possible for a positive identification element.

The more of the likely circumstances came from the testimony of **(PW2) – Laini**. He told the Court that on the night of 2.1.2019, he responded to some distress call from the neighbourhood. When he stepped out, it was the deceased on the ground bleeding from the injuries inflicted by a third person. While at that scene, **(PW3)** confirmed that the deceased mentioned the name of the 1st accused as the one culpable for the crime. Thereafter, arrangement of a tuktuk were made to escort him to the hospital where he was pronounced dead.

Further, the state summoned the evidence of **(PW4) – No. 62078 PC. Mugendi** of Garsen Police Station. His evidence was on the role he played in investigating the deceased death. Generally, in his quest to unravel the murder **(PW4)** stated that on visiting the scene, he recovered a panga and a spear suspected to be the murder weapons used to inflict fatal injuries upon the deceased. **(PW4)** further gave evidence that at the end of it, the two accused persons were arrested as suspects of the murder.

Finally, **(PW5) Omar**, testified that on the material day, within the hours of 6 to 11.00 p.m. he spent time with the deceased. It was further his evidence that immediately the deceased left at 11.00 p.m., he heard screams of an attack. That in response to the scene he found the deceased had been assaulted.

In so far as this death was concerned **(PW1) Dr. Kahindi** produced a postmortem examination report as exhibit, detailing the injuries suffered by the deceased to the carotid arteries, the trachea and oesophagus. **(PW1)** opined that the deceased cause of death was haemorhage and long collapse. The evidence of (PW1) also provides a basis for a trajectory in favour of the prosecution as to what actually happened on the material day to the deceased.

In their defence and answer to the charge the accused persons stated as follows: The 1st accused in his unsworn statement alleged that on 2.1.2019 that he found the deceased having sexual intercourse with his wife. Inspite of various warnings and reports made to the clan elder, he continued with moral misconduct.

The defence of the 2nd accused was to the effect that he knows nothing about the dispute between the 1st accused and the deceased. It was further his defence that on the fateful day, he was never in company of the 1st accused in the homestead where the assault took place. When viewing the evidence, most pursuable to the prosecution, this Court finds sufficiently so that the deceased **Osman Lila** is dead. Its also appropriate from the Constitutional evidence of **(PW2), (PW3), (PW4)** and **(PW5)** that the weapons of a panga and a spear recovered by **(PW4)** were used to inflict the fatal injuries.

Shortly, after the murder, the deceased was escorted to Ngao Hospital where the doctor pronounced him dead. The postmortem examination report produced by **(PW1) Dr. Kahindi** confirmed the extent of multiple injuries suffered by the deceased.

Further, the pathologist held the strong view that due to the injuries the deceased lungs collapsed as a result of heavy bleeding from the whole organ systems. Viewing the evidence from that perspective based on grievous bodily harm, it justifies to conclude that the death of the deceased was unlawfully caused.

In considering the rationale of Section 206 of the Penal Code on existence of malice aforethought to bring home this element against the accused beyond reasonable doubt, such evidence came from **(PW2), (PW3), (PW4)** and **(PW5).** The stark consequence from the postmortem report (exhibit 1) are matters which depict the assailants apparent intention to cause death or to do grievous harm to the deceased. The most distinguished features being the murder weapons of a panga and spear recovered at the scene and the existence of multiple injuries targeted at the vulnerable parts of the body, namely the carotid arteries severed, trachea and oesophagus split open.

This guidance on the manifestation of malice aforethought has since been approved by the Court in **R v Tubere S/o Ochen CR EACA 63.** Returning to the relative merits of the transfer of a legal burden on these important elements, the accused implicitly pleaded the element of provocation as a noteworthy development which triggered the attack against the deceased. His trilogy was centred on the deceased conduct of continuing sexual acts with his wife even after being cautioned to stop.

The Law on provocation in Kenya is as defined under Section 207 as read conjunctively with Section 208 of the Penal Code. On this doctrine a number of factors continued to emerge through case law. For instance, in **R. Manani {1942} AC 1** the Court observed:

> ***"To retort in the heat of passion induced by provocation, by a simple blow is a very different thing from making use of a deadly instrument like a concealed dagger, in short , the mode of retaliation must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter if there is no sufficient material, even on a view of the evidence most favourable to the accused, for a jury (which means a reasonable jury to form the view that a reasonable person so provoked could be driven, through transport of passion and loss of self-control, to the degree and method, and continuance of violence which produces the death it is the duty of the judge as a matter of Law to direct the jury that the evidence does not support a verdict of manslaughter. If on the other hand, the case is one in which the view might fairly be taken (a) That a reasonable person, in consequence of the provocation received, might be so rendered subject to passion or loss of control as to be led to using violence with fatal results, and (b) That the accused was infact acting under the stress of such provocation, then it is for the jury to determine whether on its view of the facts manslaughter or murder is the appropriate verdict. It is hardly necessary to lay emphasis on the importance of considering, where the homicide does not follow immediately upon the provocation, whether, the accused, if acting as a reasonable man, had the time to cool. The definition, therefore, is between asking could the evidence support the view that the provocation was sufficient to lead to a reasonable person to do what the accused did" which is for the judge to rule."***

In **R v Duffy {1949} 1 ALL ER 932 Lord Goddard** said:

> ***"Provocation is some act or series of acts, done by the dead man to the accused which could cause in any reasonable person, and actually causes in the accused a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind."***

See also the adoptive local jurisprudence on this hallmark canon in Criminal Law defence construed in line with the above principles in the persuasive authorities: **R v Hussein S/o Mohamed {1942} EACA at Pg 66, Peter Kengon Mwangi & 2 others v R {2014} eKLR, Elphas Fwamboka v R {2009} eKLR.**

In the instant case, the 1st accused gave a narratology of a general theory of justification manifested in the argument that he killed the deceased under provocation of having an affair with his wife. That the circumstances restricted his freedom of mind and choice and whatever intent arose was a limited temporal distortion of an otherwise good person.

Further, that because of the involuntary force of circumstances, the Law in its compassionate character should excuse him of the offence and allow him to be dealt otherwise other than the crime of murder. Thus was the position of the 1st accused to shift focus to defence of self under the ambit of provocation. I find no evidence that the deceased was found in the sexual act with accused wife.

By and large, I have reviewed the evidence by the state though the testimony of **(PW2)** it entails specifics that the deceased was killed by the 1st accused. The inference one draws from **(PW2)** is that the dying declaration placed the 1st accused squarely at the scene. The issue of whether or not in certain circumstances a dying declaration is admissible in appropriate case was clearly expounded in the case **AIR {1989} of R v Radha Kristina v State** in which the Court held:

> ***"The principle on which a dying declaration is admitted in evidence is indicated in Latin malent, nemo morturus procsmitur mentri, to wit (a man will not meet his maker with a lie in his mouth)"*** **(See also Choge v R {1985} KLR), and Section 33 (a) of the Evidence Act).**

As appreciated in the above cases, dying declarations are admissible as of necessity. The necessity principle has been given two interpretations. The first interpretation argues that since the declarant is unavailable the Court will be deprived of his evidence unless it is allowed to use extra judicial statements. This broad view of necessity appears tenuous, since in every hearsay situation, unless, an exception is made, the Court is being deprived of the declarants' statement.

Second, and more widely accepted view is that dying declarations are necessary in order to bring murderers to justice; because some instances the killing happens in secrecy. Again back to the facts of the case, in determining the competency and admissibility of the evidence on provocation, and further weighing it with that of the prosecution, there is no doubt there was no iota of evidence of love-affair with the deceased as referred to by the 1st accused. Thus killing is adjudged to be murder, having been done with malice aforethought, even though being touted by the accused as one occasioned by the deceased partaking of the forbidden fruit only reserved for him within the marital union.

The accused defence that the deceased had been engaging in an intimate affair with his wife which went in so far as being reported to the clan elder fell short of tactical evidence in rebuttal of the state case. I find no evidence that the accused came home at 11.00 p.m. and found his wife in the matrimonial bed with the deceased, which they customarily share as husband and wife. Despite that line of defence **(PW5)** evidence is instructive of the fact on the fateful day he stayed with the deceased from about 6 to 11.00 p.m. before parting ways to his house. That most important piece of evidence articulates the fears the Court has with the defence of the 1st accused on provocation issues.

As a consequence, the state proves the element of malice aforethought beyond reasonable doubt.

On identification of the accused persons following this same reasoning, the deceased mentioned the 1st accused as the assailant. The Court in admitting that evidence takes cognizance of some factors affecting the admissibility of dying declarations. In contrast to any other exceptions that there may be, here the deceased and the accused persons have been neighbours living within the same locality.

Closely, a kin to this evidence by **(PW3)** is a full narration of the occurrence causing death as admitted by the 1st accused. The 1st accused told the Court of past acts which served as the motive or show of bad feelings between him and the deceased. This admitted facts against a *primafacie case* for the state by **(PW2)** on placing him squarely at the scene is admissible and leads to the conclusion on the criminal act.

The cogency of dying declarations of the deceased to **(PW2),** regarding identity of the assailants expressly exonerates the 2nd accused as one of the principal offenders. All in all, I am satisfied that on the evidence before me, the state has proved the case of murder contrary of Section 203 and 204 of the Penal Code beyond reasonable doubt.

Consequently, I find the 1st accused guilty of the offence and as appropriate enter conviction for the unlawful act of killing the deceased with malice aforethought.

As regards, the 2nd accused person, it is the Courts finding that the prosecution has failed the threshold test, that he participated in any way in killing the deceased. I therefore, acquit him of the allegations of murder contrary to Section 203 and 204 of the Penal Code. He shall be set free unless otherwise lawfully held.

Sentencing verdict for the 1st convict

As seen from the record, **Juma Takano** has been convicted for the offence of murder contrary to Section 203 as punishable with a maximum sentence to serve a death in Section 204 of the Penal Code. The overarching principle for sentencing is proportionality, requiring that a sentence is proportionate to the seriousness of the offence. When determining the proportionate sentence to be imposed, the Court will have regard to the various purposes of sentencing:

(1). In cases involving those aged 18 and over at date of conviction the Court must have regard to the following:

(a). Punishment

(b). Crime reduction (including deterrence)

(c). Reform and rehabilitation

(d). Public protection

(e). Making of reparation.

A number of things stand out from the Judgment in which the **Juma Takano** was found culpable for the offence. Some of the aggravating factors include the infringement to Article 26 of the Constitution of the right to life of the deceased without any excuse or justifiable cause. The fact that **Juma Takano** is a first offender, and regrets the offence does not in any way impact the custodial threshold and the length of any such sentence be imposed by the Court. The totality of the presentence report has been considered in relation to the multiple issues captured by the probation officer. As to the practicalities of sentence calculation, time spent on remand in custody will obviously count towards the final sentence passed by this Court.

I have thought very carefully about the medical condition raised by **Juma Takano** has one of the indicative factors to purpose the particular sentence as a mitigatory factor. Unfortunately, that averment by **Juma Takano**, lacks the full facts from a certified medical doctor under Section 48 of the Evidence Act. This means that allegation is of little probative value. Our location to appreciate the Supreme Court Judgment **Francis K. Muruatetu v R {2017} eKLR,** which to me affords to guidance on sentencing offenders convicted of murder such as the one before me. Guided by the dicta and the other materials I have referred like the presented report, I come to the conclusion that a fitting sentence for **Juma Takano** will be twenty five years imprisonment with effect from the 10th January, 2019.

Orders accordingly.

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

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R. NYAKUNDI

JUDGE

<u>In the presence of:</u>

1. Mr. Mwangi for the state

2. Accused persons