



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL CASE NO. 6 OF 2017

REPUBLIC.....PROSECUTION

VERSUS

THOMAS CHENGO MWAMBIRE.....ACCUSED

Coram: Hon. Justice R. Nyakundi

Mr. Mwangi for the state

Mr. Ruttoh advocate for the accused person

JUDGMENT

The accused **Thomas Chengo Mwambire** herein was on 10.3.2017 charged before this Court with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. It was alleged that on the 21.6.2016 at Kibao Cha Ngombe village, accused murdered **Getrude Sidi Garama**.

The accused who pleaded not guilty was represented at the trial by Learned counsel **Ms. Ruttoh**, whereas Senior Prosecution Counsel **Mr. Alenga** prosecuted him by calling witnesses in support of the charge in order to discharge the standard of proof. The prosecution set out to prove the following elements:

- (1). The death of the deceased.*
- (2). That the death was unlawfully caused.*
- (3). That in causing death, the accused did so with premeditation and malice aforethought.*
- (4). That the accused person was positively identified as the perpetrator of the crime.*

The prosecution adduced the evidence from the subsequent witnesses. **(PW1), Francis Kenga** testified that on 21.6.2016 he was at home when he received a telephone call from Kongoni that someone by the name **Shaban** was assaulting the deceased. He decided to send **George Kenga (PW3)** and **(PW4), Eric Iha** to visit the area and bring the deceased home. On arrival at home, **(PW1)** realized on observation that the deceased had suffered a swollen head. Thereafter, they went to sleep awaiting the following day to take her to the hospital for treatment.

Further, **(PW1)** told the Court that the following day they went to Kongoni hospital but were to be referred to Malindi Sub-County Hospital. That did not end there as Malindi Hospital also referred the deceased to Mombasa General Hospital for further management. It was at Mombasa Hospital where she got admitted for three weeks. However, on 16.1.2017, the deceased passed away while on the second treatment at Malindi Hospital.

According to **(PW1)** as the injuries were associated with an assault, it became necessary to involve the police. Further, **(PW1)** told the Court that a postmortem was conducted to establish the cause of death. On cross-examination, the witness denied being at the scene of the assault. He only heard of it from **Shaban** that the deceased was being beaten by the accused.

In the testimony of **(PW2) – Shaban Iha**, it was on 21.6.2016 while at home, he saw the deceased being attacked by the accused. He attributed the favorable surrounding circumstances from the electricity light which made it possible for him to positively identify the accused.

From the evidence of **(PW3) – George Kenga** and **(PW4) - Erick Iha**, who identified themselves as brothers to **(PW1)** they allege that on

21.6.2016 (PW1) asked them to go for the deceased. In response to the telephone call, (PW3) and (PW4) woke up and went to (PW1) home where they found the deceased in a distressful condition and crying. At the same scene, (PW3) and (PW4) told the Court that the accused was beating the deceased. According to (PW3) and (PW4), due to the worsening condition of the deceased, they decided to escort him to the hospital. It was on examination at Malindi Sub-county Hospital and Mombasa General Hospital the doctors established she had suffered injury to the brain. In the evidence of (PW3) and (PW4) it did not take long before the deceased succumbed to death.

Next was the evidence of (PW5), Agnes Mwanjane who testified that the deceased initially was married to (PW1) but on separation befriended the accused person. In her evidence (PW5) stated in Court that while at home on 21.6.2016 she received information that the accused had attacked the deceased. From the injuries sustained (PW5) gave evidence that the deceased died soon thereafter as denoted in the postmortem.

(PW6)- Cpl. George Ndirangu who was attached to Marereni Police Station testified to the effect on the investigations carried out with regard to the murder of the deceased. He visited the scene and from the investigations (PW6) told the Court that the deceased suffered injuries inflicted by the accused. Apparently, from (PW6) testimony, the deceased cohabited with the accused where the conflict may have arisen and the ensuing offence. From the investigations by (PW6) and evidence given to the police by (PW1 – PW5), once again a postmortem examination on the body of the deceased was carried out.

On 23.1.2017 Dr. Swaleh who gave evidence and produced the postmortem report told the Court that the deceased suffered haematoma to the head. Dr. Swaleh concluded that the cause of death in her opinion was cerebral vascular haematoma.

At the close of the prosecution case what was the accused answer to the allegations made against him by the state. In a sworn statement given on oath before the Court, accused denied the offence. He recalled that prior to his arrival at home he had attended a burial. Thereafter, later on that material day as he arrived home, he found the deceased totally drunk. He also recalled that the deceased had a pre-existing medical condition which demanded of her not to take any alcohol. It was also his defence that when (PW3) and (PW4) arrived at home he was in the house but there was no conflict between him and the deceased.

According to the accused, the deceased fell ill and was informed by the relatives as she had left the home where they both cohabited together.

Determination

Given the above background did the prosecution prove beyond reasonable doubt that the accused committed the murder contrary to Section 203 against the deceased? On this aspect of the charge, I earlier outlined the ingredients upon which the standard of proof of beyond reasonable doubt is based. In those circumstances it can be said that the evidential burden as stated under Section 107 (1) of the Evidence Act lies with the prosecution. Put another, way how did the prosecution fair in proving each ingredient of the offence? In answer to that would be found by appraising the evidence visa viz each element of the offence.

(a). Death of the deceased

On this ingredient there was evidence of (PW1), (PW2), (PW3), (PW4), (PW5) and (PW6). Then that was corroboration evidence of the medical doctor (Swaleh) (PW7) who produced the postmortem examination report. The evidence as a whole satisfies the criteria to prove that the deceased is dead.

(b). The next ingredient is founded on the unlawful act or omission occasioning the death.

It is to be remembered that it all started with (PW2)- Shaban, son to (PW1). On the fateful day (PW2) was at home with the deceased and the accused person. In this respect (PW2) testified that the deceased was assaulted by the accused prompting him to place a telephone call to (PW1) on prevailing circumstances likely to put the life of the deceased in danger. That is how, the next minute saw (PW1) call (PW3) and (PW4) to move to the deceased house and effect a rescue plan. Again, in the evidence of (PW3) and (PW4), on arrival at the scene, the deceased was unable to talk, although they quipped that the accused was present at the scene. It is in that respect they forced the deceased out of the house and had her escorted to the hospital for treatment.

According to (PW1), (PW3) and (PW4) inspite of the various referrals to Malindi and Mombasa General hospital, the deceased nevertheless passed away. During all these times the witness alluded to the fact that the deceased ill health arose out of the infliction of harm by the accused. At the initial postmortem examination, their fears were confirmed which showed severe injury to the head which the doctor opined (PW7) contributed to the cause of death of the deceased. Therefore, the test of the deceased dying out of unlawful act or omission in so far as this element is concerned has been proved beyond reasonable doubt.

(c). Having so far dealt with the first and second ingredient, the test of any murder charge is on malice aforethought based on the definition and manifestation under Section 206 of the Penal Code.

In deciding whether or not the offence of murder falls and was committed as a consequence of the unlawful act accompanied with malice aforethought, there is no resort to any views but it is a matter of evidence looked at objectively. Similarly, the **Eastern Court of Appeal in Rex v Tubere s/o Ochen {1945} 12 EACA** in the interpretation of Section 206 of the Penal Code on malice aforethought applying the objective test held as follows:

“That it is the duty of the Court in determining whether malice aforethought has been established to consider the weapon used, the manner in which it was used, the part of the body targeted and injured. The gravity of the injuries inflicted and the conduct of the accused before, during and after the commission of the crime.”

Section 206 of the Penal Code imports the state of mind for murder as either intention or knowledge on the part of the offender with virtual certainty of death or grievous bodily harm as a consequence of his or her acts or omissions.

In the instant case, (PW2) stayed in the homestead with the deceased and the accused. (PW2), at time heard the screams of the deceased in response, he confirmed that the accused was assaulting the deceased. That is the time he placed a call to (PW1), who in turn informed (PW3) and (PW4) to move to the scene and rescue the deceased from the violent force of the accused. When (PW3) and (PW4) arrived in the house, apparently the deceased had difficulties in communicating and also no much information came from the accused. On this occasion (PW3) and (PW4) in consultation with (PW1), agreed to escort the deceased to the hospital. Thereafter, the deceased underwent treatment at various hospitals but was later to succumb to death. (PW7), Dr. Swaleh in the postmortem examination on the body of the deceased found severe injuries to the head. As regards cause of death, she had stated cerebral vascular haematoma. The injury to the head could have occurred from a blunt object.

In the case of **Petero Sentah s/o Lemandwa v R {1953} 20 EACA 20** the Court held that:

“malice aforethought is deemed to be in existence where the deceased died in consequence of violence inflicted on her by the appellant in furtherance of or in consequence of his committing a felony in the house.”

Therefore, the three elements namely death, unlawful act and malice aforethought are as rightly submitted in evidence by the prosecution proved beyond reasonable doubt.

(d). As far as identification in the instant case is concerned

I would rely on the principles in **Anjononi & others v R {1976-80} KLR 1566** and **R v Turnbull & others {1976} 3 ALL ER 549**. On identification, the prosecution principally based their case on the evidence of (PW2) – **Shaban Francis** and (PW4) – **Erick Iha**. There is therefore ample evidence as a whole that explains that the accused attacked the deceased. He was seen assaulting the deceased by (PW2) and (PW4) respectively. Further, in our findings the prosecution witnesses also adduced surrounding circumstantial evidence. That point to culpability of the accused in inflicting the injuries which immediately thereafter caused the death of the deceased.

The upshot of the above is that, I find the accused guilty of the charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. In the circumstances, he stands convicted and to be sentenced for that offence as per the provisions of the Law established.

Sentence

The convict **Thomas Chengo** has been found guilty of murder contrary to Section 203 as punishable under 204 of the Penal Code. The code provides that an offender is liable to be sentenced to suffer death being the maximum sentence. In addition to this provision the Supreme Court dicta in **Francis K. Muruatetu v R {2017} eKLR** govern the convicts eligibility for other alternative sentences within the discretion of the Court.

In selecting a just and appropriate fixed term sentence which adequately promotes the traditional goals of sentencing subject only to the fundamental principle that the global sentence should reflect the overall culpability of the convict, the yardstick is clearly explained by the Apex Court in **Muruatetu (I)**. In the course of this hearing I have considered the mitigation and aggravating factors of the offence. Further, the benefits gained from the pre-sentence report with a paragraph or so on the victim impact statement. In regard to rehabilitation, it is important for me to point out that there are no weighty mitigatory factors that show serious motivation of contrition. The extent and depth of the unlawful acts of fatal assault outweighs any mitigation to call for a lesser custodial sentence.

Having found so as I have done, I sentence the convict to twenty five (25) years imprisonment for the offence of murder as punishable under Section 204 of the Penal Code.

14 days right of appeal explained.

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

.....

R. NYAKUNDI

JUDGE

In the presence of:

1. MR. MWANGI FOR THE DPP

2. MS. RUTTOH FOR THE ACCUSED PERSONS