



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL CASE NO. 15 OF 2019

REPUBLIC..... PROSECUTOR

VERSUS

WILLIAM WANJE IHA ACCUSED

Coram: Hon. Justice R. Nyakundi

Mr. Mwangi for the state

Ms. Tonia Advocate for the accused person

J U D G M E N T

The accused person namely; **William Wanje Iha** was charged before this Court with the offence of murder contrary to Section 203 as read with 204 of the Penal Code. The particulars of the charge averred that on the 4.8.2019 at Hademu village, the accused jointly with others not before Court murdered **Ramadhan Kalama Kitsao**. He pleaded not guilty to the offence. At his trial he was represented by Learned counsel **Ms. Tonia** whereas **Mr. Mwangi**, prosecution counsel appeared for the state with a plea of not guilty the prosecution was under a duty to prove the following elements:

- (a). The death of the deceased.*
- (b). That the death was vide unlawful acts of the accused.*
- (c). That in causing death, the accused was actuated with malice aforethought.*
- (d). That in exclusion of any other persons it was the accused who was the perpetrator of the murder.*

In this respect, the prosecution line up eight (8) witnesses to disapprove the innocence of the accused person. At the close of the prosecution evidence, he had an opportunity to answer the charge in which he also called two witnesses in support of his defence to contravene the allegations of murder.

Before I deal with the elements of the charge and the corresponding evidence, I wish to bring out the issues of the burden of proof and the standard of proof and the standard of proof as a prerequisite duty of the prosecution in cases under this category. I am reminded of the provisions of the Law under Section 107, 108 and 109 of the Evidence Act.

In the sense of evidential burden, the term burden of proof refers to the obligation of a party to a dispute or charge to lead evidence to showcase his case in order to obtain Judgment in his favor. Therefore, in a criminal charge, the prosecution has an obligation imposed by the Law to prove the elements of the offence beyond reasonable doubt. Thereby convincing the Court as to the truthfulness of the allegations in respect of the charge. The prosecutor has to adduce evidence in support of the facts in issue, which pertain to the material and moral elements of the offence in its indictment.

Speaking of proof beyond reasonable doubt Lord Denning as he then was in **Miller v Minister of Pensions {1947} 2 ALL ER 372** held:

“That degree is well settled, it need not reach certainty, but it must carry a high degree of probability proof beyond reasonable doubt does not mean proof beyond a shadow of doubt. The Law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice if the evidence is so strong against a man as to leave only a remote possibility, in his favor which can be dismissed with the sentence of course, it is possible but not in the least probable, then the case is proved beyond reasonable doubt, but nothing, short of that will suffice. Now it is pertinent to consider the evidence alongside the elements of the offence.”

(a). The death of the deceased

It is not in dispute from the postmortem examination report dated 4.9.2019 that the deceased is dead.

(b). Whether the deceased death connecting factor revolves around unlawful acts of omission

The right to life is protected and guaranteed by Article 26 of Constitution.

(c). A person shall not be deprived of life intentionally except to the extent authorized by this Constitution or other written Law

As a general principle all homicides are considered unlawful unless excusable or justified under the Law. That therefore brings to criminal responsibility of *mensrea* and *actus reus*. The harm caused by the unlawful act or omission or the event and as a consequence in murder cases a life is lost must be traceable to the offender before he or she can be held criminally liable for the alleged indictment.

The facts on this issue are very clear from the testimonies of **(PW1) – Karisa** who alluded to the fact that on 4.8.2019 in company of others they came across the deceased who displayed injuries to the back and the head lying down on the roadside. It was the case for the prosecution that at one moment and a day **(PW2) Richard Katana** would not recall there was to be a family meeting involving the accused, his wife and alleged person stated to have an affair. However, that meeting was never to be as the accused appeared in the meeting carrying a sack stacked with a man and a woman's clothes. The aforesaid clothes being green shirt, green T-shirt, green trouser, khaki, red pair of shoes, kitege, blue trouser, green short, khaki trouser, admitted in evidence apparently belonged to the deceased and **(PW5)**.

Further, in **(PW2's)** evidence, the accused confessed before the Chief that he longer wants to co-habit with the wife and a divorce was the most appropriate. That is how a resolution on the refund of dowry was reached, so as to dissolve the marriage. The connecting factor which addresses the element of unlawful act or omission is the particularity of the accused being in possession of the deceased clothes. The existence of these personal effects of the deceased and the subsequent results of his death, specifically provides pieces of evidence relevant to causation issues and the fatal harm suffered.

In the same breadth **(PW3) – Kalama Kitsao** testified as a brother to the deceased regarding his cohabitation with the accused wife on the premise that they had parted ways. In that conversation, **(PW3)** further gave evidence that the deceased complained of the accused having taken his personal clothes from the house. Before long **(PW3)** testified that he received credible information on the death of the deceased. According to **(PW4) Baya**, the deceased was killed in his house in **(PW5) Furaha Charo** evidence, she was married to the accused but in the Course of the subsistence of the marriage critical differences arose occasioning separation. The efforts made to resolve the conflict bore no fruits. **(PW5)** would further recall that the accused came to the house where she was staying and carried away her clothes and those of the deceased.

According to **(PW5)**, it was in the course of this conflict that the accused killed the deceased, on the excuse that he was cohabiting with me while I remained to be the lawful wife to the accused. It is clear from **(PW8) – Cpl Chesaria Bruno**, who on investigations of the incident visited the scene of the murder where he was confronted with the deceased body with multiple injuries. According to **(PW8)** he took part in transporting the body to the mortuary and thereafter investigated the case which resulted in the arrest of the accused.

From the above, witnesses there is no controversy that the deceased was assaulted by another human being with intent to cause death. It is to be emphasized that the existing facts constitute unlawful acts, which were dangerous and recognizable as to reasonably cause the death of the deceased.

As established by the pathologist in the postmortem examination report, the deceased suffered multiple wounds at the occipital region extending to the parietal and multiple facial bruises/lacerations. Therefore, the conduct of the accused constitutes unlawful acts of assault which point to the cause of death. It will be noted that the prosecution evidence proves the element beyond reasonable doubt.

(c). The next issue is whether the accused had the necessary mensrea in committing the offence of murder

In accordance to Section 206 of the Penal Code, the characteristics taken into account to manifest malice aforethought are:

“intention to cause death, intention to cause grievous harm, knowledge that the act or omission will cause death intent to commit a felony and intention to facilitate the escape from custody of a person who has committed a felony. (See also the principles in Nzuki v R {1993} KLR 17, Daniel Muthee v R CR Appeal No. 218 of 2005, R v Lawrence Mukama & Another {2014} eKLR, Ernest Asami Bwire Abanga alias Onyango v R NBI – CACRA No. 52 of 1990, Morris Aluoch v R Nakuru CACRA No. 47 of 1996, Rex v Tubere S/o Ochen {1945} 12 EACA 63).

An exacting combination of factors emerge from the evidence of **(PW1)**, **(PW2)**, **(PW3)**, **(PW5)** and **(PW8)** which demonstrate that the accused committed very serious, inherently and specific intent for the crime of murder against the deceased. There was intentional infliction of bodily harm purposefully to perpetuate the underlying crime of murder. The inexorable conclusion is that the resulting death of the deceased was objectively foreseeable. The fact that the accused pursued the deceased with vengeance on the basis that he labored under the mistaken belief of existence of an affair cannot exonerate himself from an unlawful act actuated with malice aforethought.

Indeed, the defence by the accused and his witnesses did not address the salient features of the unlawful object that he knew was likely to cause death and thereby did kill the deceased with malice aforethought. In the trial, on review of the evidence by **(PW5)** reveals of a protracted relationship with the accused prior to the death of the deceased. The witness **(PW5)** appeal for resolution of the conflict with the accused failed objectively to bear any meaningful fruits. Therefore, the only component was for the deceased to execute the murder of the deceased, which offence he knew carried consequences of death. The accused actually went about his unlawful activities at the time in

question fully aware, conscious and with foreseeability of certainty causing the death of the deceased. What is important in the context of proof of malice aforethought is the certain objective descriptions of actions like carrying away **(PW5)** and deceased clothes to the Chief's office. Thereafter, tracing the deceased and intentionally inflicting multiple injuries. There is nothing in the defence to controvert the direct and circumstantial evidence adduced by the prosecution witnesses.

The facts themselves do not negate malice aforethought. Therefore, bringing the case within the stringent criteria under Section 206 of the Penal Code. In addition to the intention to cause death, this case depicts an accused in causing bodily harm likely to cause death was reckless as to that result.

It is sufficient to say that the mental element required by Section 206 of the Penal Code is not so remote as a fundamental aspect of the case to trigger the application of the provisions.

Admittedly, I hold a strong view that the prosecution in amalgamation of indispensable prerequisites establishes the crime of murder contrary to Section 203 of the Penal Code beyond reasonable doubt against the accused person. That's the reason I find the accused guilty and would do so by securing a conviction in their favor as per Section 107 (1) (2) of the Evidence Act as read in conjunction with Section 203 of the Code.

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

.....

R. NYAKUNDI

JUDGE