REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL CASE NO. 21 OF 2018

REPUBLIC.....PROSECUTION

VERSUS

KALUME CHENGO KING'UMBE.....ACCUSED

CORAM: Hon. Justice R. Nyakundi

Ms. Sombo for the state

Ms. Ruttoh for the accused

JUDGMENT

The accused **Kalume Chengo King'umbe** is charged with the offence of murder contrary to Section 203 of the Penal Code committed on 10.11.2018 at Mkangangani Village Gede Location against **John Mboro Saidi.** The accused plead not guilty.

He was represented at the trial by **Ms. Ruttoh Advocate** while the prosecution counsel **Ms. Sombo** prosecuted on behalf of the state. The crucial evidence upon which the prosecution case is based came from the seven (7) witnesses. The case for the prosecution consisted of both direct and circumstantial evidence of the seven witnesses to prove the following elements:

a). The death of the deceased

b). That the death was unlawful

c). That in causing death the accused had malice aforethought

d). That the accused was positively identified as the one who caused the death of the deceased.

According to **PW1 (Neema Thinga Kalu),** she operates a club which sells *'Mnazi drinks'*. In her testimony on 10.11.2018, part of the customers in the club included the deceased **John Mboro Saidi** and the accused person **Kalume Chengo King'umbe**. According to **Neema Thinga Kalu (PW1),** she left the club at about 9.00 p.m. for her house which is not far away from the club. While at home she testified as having heard some screams from the directions of the club talking about a millipede.

It is at that moment she decided to go back to the club to establish the cause of the screams and the millipede issue. That is when she found the deceased and accused quarrelling over the millipede which crossed the path where they were taking some drinks. Simultaneously, the accused said that he was being called a witch because of the millipede that was passing along. It was at that moment the deceased uttered, I have been hit with a stone on the head. Apparently PW1 told the court that she did not see the person who threw the stone.

In cross-examination (PW1) said that the accused was seen by other people leaving the club. She also confirmed that on arrival at the club, the deceased and the accused were still quarrelling over the millipede.

PW2 – Dhahabu Mwangolo Ziro, who works in the same club with PW1, testified that on the material day of 10.11.2018, accused and the deceased were within the premises having drinks. Later a quarrel ensued between them involving a passing millipede and the accused complaining to the deceased that he has alleged that he is a witch. It did not take long, PW1 came back from her house and suddenly the deceased said that he had been hit on the head with a stone. Shortly, afterwards together with PW1 they moved to attend to the deceased injuries.

PW3 – Samuel Biria Karisa gave evidence that on 10.11.2018 while in company of **Baraka PW4**, the deceased placed a call to Baraka asking that his fish be taken to him at the club. It was then agreed that they go to the club operated by (PW1). At the club PW3 testified that he was able to see PW1, PW2 and the deceased and no one else. According to PW3, it did not take long before the deceased cried out that he has been hit. At that moment PW3 states that he saw somebody running but on going after him they did not manage to apprehend him as such, as he disappeared out of their visibility. PW3 returned back to the club to assist the deceased to be taken to the hospital for treatment. At the hospital, the deceased succumbed to death while undergoing treatment.

PW4 – Baraka Kasiwa Kahindi testimony was similar in all material aspect with that PW3 with regard to what he saw take place from the time he delivered the fish to the deceased. Apparently, it is on record that PW3 and PW4 happened to be together when the deceased telephoned PW4 to take the fish to the club. As they arrived at the club and after some short period, the deceased voice came out that he had been hit on the head.

PW5 - William Said Konde father to the deceased testified on the injuries sustained by the deceased while in company of other two young men. The following morning, he was taken to Kilifi hospital and later referred to Mombasa hospital for further care and management. According to PW5, the deceased died in the course of treatment. Thereafter PW5 further testified that the deceased mentioned the name of the accused as the one who hit him with a stone.

PW6 – PC Moses Parker and other police officers received the report on the murder incident which was visited for purposes of collection of evidence. It was while at that area the accused person was arrested and after further investigations charged with the offence of murder. The investigating officer **PW7 PC Gideon Mutua** testified that the initial report was on an assault of the deceased. However, the following day there was confirmed information that the deceased had passed on presumably from the injuries inflicted by the assailant. The crime scene was visited and a postmortem examination arranged which he participated on 19.11.2018. the postmortem by **Dr. Seif** was produced in evidence as Exhibit 1.

At the close of the prosecution case accused person was placed on his defence. He elected to give unsworn statement and denied any involvement with the death of the deceased.

On the night in question, the accused told the court that he was at the club allegedly stated to be the crime scene by the prosecution witnesses. He remembered that during that social evening there were two men in conflict with each other but he did not bother to find out the reason of the dispute. He told the court that after sometime he left the club and the following day he went about his daily duties. According to the accused, it occurred to him that he was a suspect of murder when police officers went to his place of work to effect an arrest. He therefore, denied that he was the man who hit the deceased with a stone on the fateful night.

The Learned counsel **Ms. Ruttoh** summed up all the evidence in her submissions and was of the opinion that the offence of murder has not been proved beyond reasonable doubt for the prosecution to secure a conviction.

On her part **Ms. Ruttoh** submitted, identification of the accused is central to the conviction. She contended that the prosecution unfortunately failed to meet the legal threshold on the issue of identification. Learned counsel argued that the possibility that the assailant was another person and not the accused was never ruled out by the prosecution case. This is more so according to Learned counsel that the attack occurred at night and the court was never told of any specific source of light to ensure a positive identification of the accused.

Learned counsel invited the court to be guided by the principles in **Gabriel Kamau Njoroge v Republic [1982 – 88] KAR 1134, Joseph Maina Ndogo v R Criminal Appeal No. 4 of 2012.** Further, Learned counsel submitted that the alibi defence put forth by the accused remain uncontroverted to exonerate him from being at the scene of the crime. It is further contended that the facts and evidence on record is incapable of forming a chain of circumstantial evidence in the approach stated in the case of **R v Kipkering Arap Koskei and Another [1949] 16 EACA and Musoke v R [1958] EA 715;** On account of this Learned counsel urged this court to dismiss the charge against the accused person.

Unfortunately, I did not have the advantage of the prosecution counsel submissions on her perspective of the case preferred against the accused.

Analysis and determination

In considering the charge of murder contrary to Section 203 of the Penal Code it must be borne in mind that in terms of the duty vested with the prosecution as provided for in Section 107 (1) of the Evidence Act, proof of existence or non-existence of facts on issue must be beyond reasonable doubt.

The findings elements of the offence to be proven that high standard of proof constitute the following:

a). The fact of the death of the deceased.

b). The death so caused was unlawful.

c). That in causing death the accused was actuated with malice aforethought.

d). That in the circumstances it was the accused who killed the deceased (See R v Mohammed Dadi Kokanev & others [2014] Criminal Case No. 21 of 2010, 3 [2014] eKLR.

The context of this statement in Section 107 (1) of the Evidence Act holds the prosecution to be the burden bearer as illuminated in the case

of **Woolmington v DPP [1935] A.C.** The prosecution as the burden bearer in criminal cases is underpinned within the constitutional doctrine in Article 50 2 (a) on the presumption of innocent unless the contrary is proven by way of evidence. An accused person before any court of law is innocent unless and until the prosecution has discharged the burden of proof beyond reasonable doubt.

That is the standard which I will subject the evidence in this case against the accused person to establish whether the yardstick of proof of stipulated in the Law has been met.

As far this offence is concerned, the critical ingredient out of the four specified above is that of malice aforethought. It is the ingredient which distinguishes other forms of homicide and murder as defined in Section 203 of the Penal Code. Therefore, prove of unlawful act to cause death must be directly linked with malice aforethought for an offender to be convicted of the murder charge.

In view of its centrality I will endeavor to discuss at the earliest as an entry point of establishing whether the prosecution has discharged the burden of proof demanded of the Law. In this respect Section 206 of the Penal Code defines malice aforethought and the manifestation of it by evidence proven by any one or more of the following circumstances:

> **a). An intention to cause the death of or to do grievous harm to any person, whether such 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 such person is the person actually killed or not, although such knowledge is accepted by indifference. Whether death or grievous bodily harm is caused or not by a wish that it may not be cause?**
>
> **c). Intention to commit a felony.**
>
> **d). intention to facilitate the escape from custody of a person who has committed a felony.**

The ingredient for purposes of the intention to cause grievous harm imports the provisions of Section 213 as read together with Section 234 of the Penal Code. The definition of grievous harm connotes physical bodily harm consisting of maim or permanent harm to the victim. Further the injury is either to the external or internal organ of a human being.

In the various Judgments from the superior courts Section 206 of the Penal Code has been interpreted and construed to reflect circumstances in which malice aforethought is distinguishable with unlawful acts without malice.

The classic case of **Rex v Tubere s/o Ochen [1945] 12 EACA 63** laid down some key elements if proved by prima facie evidence would constitute malice aforethought that:

> **"the weapon used, the manner in which it was used, part of the body injured, the conduct of the accused before, during and after the criminal act."**

Similarly, in **R v Shansli s/o Miya [1951] 18 EACA 198,200** the predecessor of the Court of Appeal held:

> **"The essence of the crime of murder is malice aforethought, and if the circumstances show that the fatal blow was given in the heat of passion on a sudden attack or threat to attack which is near enough and serious enough to cause loss of control. That the inference of malice is rebutted and the offence will be manslaughter."**

The act which constitutes malice aforethought is a question of fact to be proven by evidence tendered by the prosecution witnesses. The ultimate requirement of the law is for the prosecution to proof the offence of murder beyond reasonable doubt upon appraisal of the totality of evidence against an accused.

In the case of **Rex v Mazabia bin Mkomi [1941] 8EACA 85 "the Court of Appeal of Eastern Africa determining the circumstances of an appellant who killed his friend by shooting him with an arrow at close range in the rear, and there was no evidence of motive, provocation or insanity confirmed the causation for the offence of murder by the trial court."**

The peculiarity of this ingredient as defined under Section 206 of the Penal Code is the state of mind or mensrea and knowledge of the accused in the commission of the offence. When considering whether in killing the deceased was accompanied with malice aforethought. It will need not involve ill will, hatred or premeditation of the offence.

The weight to be given to this fact of malice aforethought depends wholly on the circumstances of each case. In the present case the prosecution case placed reliance on the evidence of PW1, PW2, PW3, PW4 and PW5 to discharge the burden of proof of beyond reasonable doubt on this ingredient.

As pointed out in my view the evidence was partially direct and substantially circumstantial on the events which led to the deceased death. Where there is circumstantial evidence implicating the accused in the commission of the crime courts have taken this approach as expressly stated in **Chimersa Omar Chimera v R Criminal Appeal No. 56 of 1998**

> **"It is settled Law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:**

i). The circumstances from which the inference of guilt is sought to be drawn must cogently and firmly established.

ii). Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused.

iii). The circumstances taken cumulatively should form action so complete that there is no escape from the conclusion that within are human probability the crime was committed by the accused and no one else."

In the case before me according to PW1, the deceased and the accused were regular customers at her Mnazi club. Therefore, on this fateful day of the 10.11.2018 it was one of those routine social evening they happened to be together in the club. Prior to the assault PW1 confirmed to the accused that she witnessed the deceased and accused quarreling over the passing of a millipede and accused complaining that he had been called a witch.

Thereafter, the deceased was hit on the head. On a fairly detailed account PW2 who also is an employee of PW1 stated that while in the club selling alcohol to the accused, the deceased and other persons, a quarrel ensued between the accused and the deceased on a millipede moving towards the direction of the accused.

The argument main contention was that the millipede had something to do with witchcraft on the part of the accused. In their testimony PW1 and PW2 allude to the fact that accused left the club apparently for home, it did not take long from the time of the accused leaving the club and the deceased being hit with a stone. PW3 and PW4 in their testimony placed great emphasis that on arrival at the club it was only PW1, PW2, the accused and the deceased who were present without any other person. When the evidence of these witnesses is assessed cumulatively with the surrounding circumstances before the deceased was assaulted there was no third person at the scene. From the very outset, the evidence of PW1, PW2, PW3 and PW4 was quire independent of each other on the involvement of an alteration between the accused and the deceased on or about 9.30 p.m. at Mnazi club on the fateful day.

The accused was the main actor who picked a quarrel with the deceased. Indeed, although there is some indication that he stepped out under the excuse he was leaving for his home, the proximity as to time and sequence of events were so closely connected that night to warrant this court to place him at the scene.

I have taken into account the background facts that before the arrival to the club by PW3 and PW4, the accused and deceased were the only ones in that crime scene. The quarrel had started even before the arrival of PW3 and PW4. The consideration of the scene of the assault and the opportunity which the accused could have committed the offence is distinct to rule out that he had completely left the vicinity of the club.

This court cannot lose sight of the fact that there was poor lighting system is not fatal to the prosecution case. It is important from the assessment of the evidence that at the time accused and deceased were quarrelling none of them was armed with a dangerous weapon. It would not be speculative and the court would not be indulging in conjecture on the force of the evidence to rely on the provisions of Section 119 of the Evidence Act which provides:

"The court may presume the existence of any fact which it thinks likely to have happened regard being had to the common cause of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

In my considered view, it is sufficient to conclude that at the time accused stepped out to go home, there is a high probability and beyond peradventure that he went out to arm himself with a stone which he used on target to assault the deceased.

In other words, the accused conduct after a heated quarrel with the deceased over a millipede and witchcraft 'naming' draws a logical inference that he was the one who hit the deceased is not in conflict with the prosecution case. This is not a case where the actual circumstances of the death of the deceased can be said to be unknown or subjective.

The mens rea required is the intention to cause death or grievous harm to the deceased. Further, malice aforethought is stated to be complete under Section 206 (b) if an accused person performs an act or omission in the knowledge that death or grievous harm is a likely result. The court in **S v De Bruvn en 'n' Ander [1968] (4) SA 498** the court held that:

"Legal intention is present if the accused foresees the possibility, however remote, of his act resulting in the death of another, it will not assist the defence to show that the result of injury or worse appeared highly improbable or remote."

I take it that what happened was that when the accused picked a stone and targeted the head of the deceased he intended to cause grievous harm or death. The deceased died a day after the attack from those injuries. **Dr. Seif** who examined the deceased body on 19.11.2018 found the head to have sustained scalp hematoma on right parietal region and depressed scalp fracture. He opined that the cause of death was blunt trauma on the head with massive subdural hematoma. The injuries sustained by the deceased are consistent with the dicta by the Court of Appeal in **Ernest Asami Bwire Abang alias Onyango v R Criminal Appeal No. 32 of 1990** where the court held inter alia that:

"the fact that the brutal killing was well calculated and planned by the appellant he had an intention to kill the deceased."

The circumstances in this case by no stretch of imagination can amount to such provocation as defined in Section 207 as read with Section 208 of the Penal Code to warrant a lesser finding of manslaughter as rebuttal to the ingredient of malice aforethought in the murder charge. The presence of a millipede in a public club where the accused and deceased had gone drinking Mnazi prima facie could not amount to provocation in any event.

The Law specifically the constitution under Article 26 is meant to uphold the sanctity of the right to life. Therefore, no system of Law can sanction death of another human being just on a slightest capriciously or whimsical defence of provocation.

The encounter of a duel between the accused and the deceased did not end at the time he stepped out of the premises but on violently hitting back with a stone. This inference I draw from the circumstantial evidence has not been controverted by the accused defence.

The prosecution evidence establishes that the killing of the deceased was without acts of provocation as defined in Section 208 of the Penal Code. As earlier indicated **PW5, William Saidi Konde** evidence is to the effect that when he was with the deceased in an attempt to get him treated at Coast General Hospital he pointed out that the accused Kalume hit him on the head. The evidence by PW5 falls squarely within the provisions of Section 33 (a) of the Evidence Act which provides that statements made by deceased person are admissible in the following cases:

1. Relating to the cause of death .

"When the statement is made by a person as to the cause of his death or as to any of the circumstances which resulted in his death, in cases which the cause of that person's death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made under the expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."

The test that uniquely justifies the dying declaration as an exception to the hearsay evidence under this proportions comprises of the following:

(1). That the declarant is unavailable during his or her trial.

(2). The statement was made while the declarant believed that his or her death was imminent and finally that the statement concerns the cause of death of the declarant impending death.

This was the dicta in the English persuasive case of the **King v Woodcock {1789} 168 English Reports 352, where the court admitted "a dying statement by a woman blaming her husband for her severe injuries after being bitten. The court justified admitting the uncorroborated statement on the grounds that such statements are made in extremity, when the party is at the point of death, and when every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations, to speak the truth. Further, the court held that a situation so solemn, and so awful, is considered by the Law as creating an obligation equal to that which is imposed by a positive oath administration in a court of justice."**

This same position is emphatically confirmed in our Kenyan Criminal Legal system by none other than the Court of Appeal in case of **Philip Watie v R {2016} eKLR.**

In the instant case besides the watertight evidence directed at the accused person, the admissibility of the deceased dying declaration cannot be impugned.

It is necessary to point out that there is not requirement in Law that a dying declaration must be corroborated before the court can act on it. But in the event that the only evidence available is that of a dying declaration, the circumstantial evidence must be weighed in totality. The court would explicitly direct itself on the nature of a single identifying witness and the probative value of a dying declaration in placing the accused on the scene of the crime.

However in the present case besides the evidence of PW5 on dying declaration, the admitted evidence of PW1, PW2, PW3 and PW4 stands out as independent circumstantial evidence implicating the accused with the murder of the deceased. The result of the prosecution testimony of PW5, considered with rest of the facts proven by PW1, PW2, PW3 and PW4 brings the case within the provisions of Section 124 of the Evidence Act.

The alibi defence raised by the accused that he was never at the scene of the murder at the Mnazi club did not controvert the overwhelming evidence by the prosecution. The fact that the accused stepped out of the bar does not pass the test of alibi defence that excludes him completely to have had the opportunity to commit the offence. When such a defence is raised or offered by an accused person the Court of Appeal stated in the case of **Kiarie v R [1984] KLR 739**

"That it is sufficient that an alibi defence introduces into the mind of the court a doubt that the defence was not unreasonable."

I bear in mind that the cardinal principle in the administration of criminal justice is that in deciding whether the alibi defence rebuts the evidence of the prosecution to discharge the burden beyond reasonable doubt. See as stated in **Miller v Minister of Pensions [1947], 2ALL ER 372.** Due regard must be given to the fact that both the legal and evidential burden never shifts to the accused. Although, the alibi defence was raised at the tail end of the trial, it is inconceivable that the accused was elsewhere and not at the scene.

From the analysis of the evidence there is no other aspect the accused relied upon to exonerate himself from culpability. Taking all the circumstances of the case into account, its least improbable that the accused alibi defence is of a nature and tenor to challenge the prima facie evidence which positively places the accused at the scene of the crime.

I am therefore satisfied that the deceased died on 10.11.2018 from the injuries inflicted by the accused person who used a stone to hit the

head of the deceased. That the nature of the consequences of his unlawful act of assault seriously endangered the life and being of the deceased that a day after he succumbed to the injuries.

In all the circumstances the postmortem report examination findings are depictive that by accused targeting the vulnerable part of the head of the deceased he intended to cause death or permanent harm. Unfortunately, the harm led to his death.

I find the prosecution has established beyond reasonable doubt within the provisions of Section 203 of the Penal Code that the accused killed the deceased with malice aforethought.

For these reasons the accused is found guilty of the charge of murder, any alibi defence is hereby dismissed and as a consequence accused stands convicted.

On sentence, the same be considered within the framework of the Supreme Court decision in **Francis Karioko Muruatetu v R [2017] eKLR**.

Sentence

The crime for which the convict is to be sentenced was committed while he was under the influence of alcohol but that does not militate against the intention to cause death or grievous harm.

Under Section 20 (6) of the Penal Code, I have removed the aggravating factors and mitigation that may be in existence. It is apparent that the convict conceived in his mind that the passing of the millipede was evidence of witchcraft on the part of the deceased. He turned a blind eye to the fact that millipedes may be part of the family of creatures created by God which were also saved by entering Noah's Ark. **(See Genesis 7: 1-16)**

In considering all dispassionately, the convict far removed from himself from the fact of creation that millipedes are part of creation and they may be in millions on the face of the earth. For all these were presented not for reasons of witchcraft but saved by God's command.

Murder is the most heinous offence against the person, the right to life, duly acknowledged by the constitution under Article 26 should not to be terminated without any justification or excuse. From the record the convict committed this offence when of sound mind and went ahead to arm himself and persistently inflicted harm which brought about the fatal injuries, the destroying and permanently dismembering the body ignoring any intervention from other people at the scene showed an intention to kill the deceased. The fact of a millipede was no provocation on the part of the convict to act with excessive force.

I find no mitigation or extenuating factors to outweigh aggravating circumstances in which the deceased met his death.

I take judicial notice that there does not appear to be any good reason why this county the residents seem to live under the curse of witchcraft. It's no longer a secret that the mere tag of being labelled a witch or wizard without any proof can be taken as a license to kill.

In spite of public awareness that murder is a crime, there is continued support and increase of this unjust crime, deliberately committed against innocent citizens on grounds of witchcraft or sorcery.

Having considered the aggravating factors with the range of mitigation offered by the convict, the circumstances of this case call for a deterrence sentence. To me any other factor as to the character or immediate remorse of the convict only goes to save him from the noose of the death penalty. The death of a human being is so traumatic that no mitigation can heal the wounds of the victims who lose a family member through intentional and unlawful killing. All in all, I sentence the convict to thirty five (35) years imprisonment.

Fourteen (14) days right of appeal explained.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 27TH DAY OF FEBRUARY 2020

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R. NYAKUNDI

JUDGE

<u>In the presence of</u>

1. Ms. Ruttoh for the accused person

2. Ms. Sombo for the state