



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL CASE NUMBER 6 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

BEN SIMIYU KHWATENGE.ACCUSED

J U D G M E N T

The accused Ben Simiyu Khwatenge was charged with offence of murder Under Section 203 as read with Section 204 penal Code. The particulars of the offence are that on 21st day of December, 2014 at Musembe Village in Bungoma North District within Bungoma County murdered John Wanjala Nato.

The prosecution's case is that on 21st December, 2014 **PW 1 Rose Mulongo** went to the house of Ann Waswa to be planted her hair. While there, the accused who was her boyfriend came. She told him that she wanted to end the relationship. The accused got annoyed and told her that if she left him, he will kill her. He then held her and tore her cloth. She ran to the kitchen house of Ann. Accused followed her inside the kitchen and started beating her with kicks and fists. Her screams attracted neighbours among them the deceased John Wanjala Nato. The deceased then went to separate them. The accused then left beating Rose and started attacking the deceased with fists and kicks. He then held the deceased and fell him down. He then stepped on the deceased with his feet while wearing boots. The witnesses ran away, leaving them struggling. Later she learnt that deceased died while being taken to hospital.

PW 2 Ann Naliaka Waswa was at her home when Rose came for her hair to be planted. While there the accused came and called Rose who went to him. He then started assaulting her. She went to separate them but accused hit her. Rose ran into the kitchen and he followed her. The deceased who was passing by came to assist. The accused then beat him with fists and kicks. The deceased fell down. Many people came and accused ran away.

PW 3 Joe Katenge Nato the brother of the deceased received information that deceased was lying down unable to talk. He went there and found him lying in a trench. He and another took him to hospital where he was pronounced dead.

PW 8 No. 232598 Chief Inspector Francis Mweu attached to Albikula Police station received information of the death. He visited the scene. He found the body having been brought home. He was shown the scene where it had been removed and he drew a sketch plan. He examined the body and saw it had injuries on the chest which appeared swollen. He recorded statements and caused accused to be arrested.

PW 9 Dr. David Mukabi performed a post mortem examination on body of the deceased. He found the deceased had bruises on above left eye, bruises on abdomen, left shoulder and knee. On opening the body he found a ruptured spleen with bleeding in abdominal cavity and minor cut on the liver. He formed opinion that cause of death was due to internal bleeding due to rupture of spleen, caused by a blunt object. He produced post mortem report exhibit 5.

The accused on being put on his defence gave sworn evidence. He testified that he knew the deceased as he was married to his aunt. On 21st December, 2014 he stated that he did not see the deceased as he was at Endebes where he had gone. He came back on 16th February, 2015 only to be arrested and later charged.

On being cross-examined the accused stated that he went to Endebes in early October, 2014 and came back on 11th December, 2014. He went back on 13th December, 2014 and came back in February, 2014 and that the last saw deceased in November, 2014.

The accused is charged with offence of murder contrary to Section 203 as ready with Section 204 of the Penal Code which provides: -

203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

204. Any person convicted of murder shall be sentenced to death.

In **Republic Vs Andrew Omwenga (2003) eKLR** on the elements of the offence of murder the court said: -

“It is clear from this definition that for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission. There are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are:

(a) the death of the deceased and the cause of that death;

(b) that the accused committed the unlawful act which caused the death of the deceased and

(c) that the Accused had the malice aforethought.

The fact and cause of death: -

On the fact and cause of death PW 9. Dr. David Mukabi performed the post mortem examination on body of deceased. He found the deceased had bruises on above eye, large bruise on upper abdomen, left shoulder and knees on inchmeal examination he found the spleen was ruptured leading to bleeding into abdominal cavity. There was also a minor cut to the liver. He formed opinion the cause of death was due to internal bleeding as a result of ruptured spleens with this evident the prosecution in my view has established not only the fact of death but also the cause thereof.

The unlawful act or omission that caused the death must be proved. **PW 1** Rose Mulongo testified that when the deceased went to separate her from the accused who was beating her, the accused turned to the deceased and started beating him. She stated: -

“The deceased came to separate us. The accused left me and went towards deceased. He got hold of the deceased and fell him down. He then stepped on him while wearing boots.”

Pw 2 Ann Naliaka Waswa who was also present stated: -

“The deceased who was passing came to assist. The accused also beat him with fists and kicks. He fell down. When he saw more neighbours coming, accused ran away.”

PW 7 Caroline Nanjala Wanjala the wife of the deceased testified in cross-examination that she observed the deceased and had injuries in the abdomen caused by being stepped on. **PW 8 CI Francis Mweu** who also observed the deceased said he had injuries on the chest which appeared swollen.

From the evidence of these witnesses, the deceased was beaten by kicks and fists and was felled down and stepped on the abdomen area. These caused the injuries he sustained. These kicks, fists and felling down and stepping on the deceased were in my view pieces of unlawful act by the Perpetrators on the deceased.

The prosecution who besides proving the *actus reus*, must prove the *mens rea*. The *mens rea* in murder is the malice aforethought Section 206 Penal Code defines malice aforethought as: -

“206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances

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(a) an intention 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, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony”

For the court to discern malice aforethought from the unlawful action or omission. In **R Vs Tumbere S/o Ochian 1945 12 EACA 63**, the court provided aspects the court should consider to discern malice aforethought.

- 1) **Nature of weapon used**
- 2) **The manner in which it was used**
- 3) **The part of the body targeted.**

4) **The nature of the injuries inflicted either a single stab wound or multiple injuries.**

5) **Conduct of the accused before, during and after the incident.”**

In this case, the perpetrator kicked the deceased several times and also hit him with fists. He fell him down and stepped on his abdomen a very vulnerable part of the body. All these shows an intention to kill or do grievous harm to the deceased and, therefore, find that malice aforethought has been established.

The other ingredient the prosecution must establish is that it is accused who executed the unlawful act or omission that caused the death of deceased.

The accused in his defence testified that he did not commit the offence as he was not at the scene. He testified that at the time of occurrence of the offence he was in Endebes far away from the scene of crime. In short he raises an alibi defence. An alibi defence is a defence based on information that the accused was not at the scene of crime when the crime occurred and that he was somewhere else and could not be the person who committed the crime. In the Canadian Case of **R Vs Tomnilson 2014 ONCA 156** the Ontario Court of appeal recorded the principles of alibi evidence and stated: -

“First the latin word alibi means “elsewhere” when used in the context of criminal prosecution an alibi is a claim that a person, usually charged with a crime was elsewhere when the allegedly criminal conduct took place and thus it was impossible for him to have committed it.

Second, to constitute an alibi the supportive evidence must be dispositive of the final issue of guilt or innocence of the accused.

Third, alibi as with any defence, justification or excuse advanced at a trial is subject to the air of reality test described in R Vs Cinous (2002) 2 SEP 3 there must be some evidence upon which a properly instructed jury acting reasonably could acquit if they believe the evidence to be true.

Finally, instructions on alibi must relate to reasonable doubt to the evidence raised in support of alibi. The instructions in alibi should make it clear.

1) That there is no onus on the accused to prove the alibi.

2) That if the jury believes the alibi evidence, they must find the accused not guilty.

3) That even if the alibi jury does not believe the alibi evidence. If they are left in reasonable doubt by it they must find the accused not guilty.

4) That even if the alibi defence does not raise a reasonable doubt about the accused’s guilt the jury must determine on the basis of all the evidence whether the crown counsel has proven the guilt of the accused beyond reasonable doubt.”

Even where an accused raises a defence of alibi the accused does not assume the responsibility of proving the alibi. (See **Ssentale Vs Uganda (1968) EA 36**) the burden always remains on the prosecution to prove his guilt. In **Wangombe Vs Republic (1976-80) 1 KLR** the Court of Appeal said: -

“However, the accused was required to raise the defence of alibi at the earliest opportunity to enable the prosecution and the investigating officer to check it out to determine its veracity or the lack thereof.”

This principle requires the accused person who wishes to put up a defence of alibi to raise it as earliest opportunity either by intimating it to prosecution or through cross-examination of witnesses for the prosecution to show that that will be his defence.

In **R Vs Sulcha Singh S/o Wazir Singh & Others (1939) E6EA 145** the Court of Appeal for Eastern Africa on this stated: -

“if a person is accused of anything and his defence is an alibi, he should bring toward this alibi as soon as he can because firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in his interval and secondly if he brings it forward the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped.”

The accused in this case did not intimate his alibi defence nor did it come out in cross-examination at the prosecution witnesses. He only brought it up in his defence for the first time. In **Festo Androa Asenua & another Vs Uganda, Criminal Application No. 1 of 1998** the court observed: -

“We should point out that in our experience in Criminal proceedings in this Country it is the tendency for accused persons to raise some sort of alibi always belatedly when such accused persons give evidence. At that stage the most the prosecution can do is to seek adjournment of the hearing of the case and investigate the alibi. But that may be too late. Although for the time being there is no statutory requirement for an accused person to disclose his case prior to presentation of his defence at the trial, or any prohibition of belated disclosure as in the U.K. Statute cited above, such belated disclosure must go to the credibility of the defence.”

Where an accused raises as they often do, the defence of alibi at the time of defence Section 212 of the Criminal Procedure Code can be invoked by the prosecution.

Section 212 of the Criminal Procedure Code provides: -

“If the accused person adduces evidence in his defence introducing a new matter which the prosecutor could not by the exercise of reasonable diligence have foreseen, the court may allow the prosecutor to adduce evidence in reply to rebut that matter.”

In appreciating an application under Section 212 Criminal Procedure Code, this court in **Benard Shikuku Wamalwa Vs Republic (2019) eKLR**: -

“This application however raises an important issue about the conduct of fair trial. Article 50 of the Constitution provides provision for fair hearing which includes the need for prosecution to provide evidence intended to be used against the accused to the accused. Since the tenets of a fair trial includes the right of the accused and the interest of society on whose behalf prosecution is done, it may be necessary to develop legal mechanism to provide that where the accused defence will be an alibi; such defence be intimated to prosecution in advance to avoid ambush on the prosecution.”

Where an alibi defence has been raised as in this case, It Is upon the prosecution that the accused was at the scene of the crime and therefore, would have committed the offence, and that there is no reasonable possibility that he was elsewhere.

In this case, the accused in his defence stated that on 21st December, 2014 he was at Endebes. He went there in early October, 2014 and came back home on 11th December, 2014 and went back on 13th December, 2014. From 13th December, 2014 he came back home in February, 2015. He said he was with other people at Endebes but did not call any of them as his witnesses. He said he last saw the deceased in November, 2014 and the offence occurred on 21st December, 2014.

The prosecution can do so by employing any of the following application: -

1) Whereby they have intimation as the details of alibi, to tender evidence from witnesses who will testify that he was not at the place where he says he was at the time. This for instance if he says he was in a certain place with a known person, evidence of that persons to testify that he was not with him.

2) By evidence placing the accused at the scene of crime. This can be done by way of witnesses testifying that they saw him at scene of crime at that time the offence was committed. This can also be done by way of evidence of technology for instance closed circuit television images, telephone mobile technology to show for instance that he made calls through a certain telephone must which is located at that place, or any other technology aided evidence.

PW 1 and PW 2 are people well known to the accused. The accused admits that they are known to him. The incident occurred at around 3 p.m. during the day. It occurred at the home of PW 2 Ann in broad daylight. The accused engaged and spoke to the witnesses. Indeed he was assaulting PW 1 Rose when the deceased came to separate them. All these show that the conditions for positive identification or recognition with no possibility of error existed.

Those prosecution witnesses evidence in my view, firmly placed the accused at the scene of the offence.

In **Ganzi & 2 others Vs Republic (2005) I KLR 52**. The court stated that: -

“Where the defence of alibi is raised for the first time in appellants defence and not when he pleaded to the charge the correct approach is for the trial court to weigh the defence of alibi against the prosecution evidence”

The prosecution evidence in this case has placed the accused at Musembe Village Bungoma North District where the deceased was murdered. The prosecution has, therefore, be evidence displaced the alibi defence advanced by the accused.

I am, therefore, satisfied that the prosecution has proved its case beyond reasonable doubt. I, therefore, find accused **Ben Simiyu Khwatenge** guilty of the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code and convict him accordingly.

Dated, signed and delivered at Bungoma this 7th day of May 2020.

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S N RIECHI

JUDGE

REPUBLIC OF KENYA

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REPUBLIC. PROSECUTOR

VERSUS

BEN SIMIYU KHWATENGE. ACCUSED

S E N T E N C E

29/5/2020

Before S N Riechi J

M/s Barasa – court assistant

Thuo for the State

Were for accused – absent

Accused – present in Bungoma Prison

Court: The court has received the Victim Family Impact Report dated 27th May, 2020. This court has considered the mitigation and victim Impact Report. Accused is sentenced to Twenty Five (25) years Imprisonment. Right of Appeal within 14 days.

Dated, signed and delivered at Bungoma on 29th day of May, 2020

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S N RIECHI

JUDGE