REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL CASE NO. 14 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

KAHINDI MWASAMBU KAI..... ACCUSED

CORAM: Hon. Justice R. Nyakundi

Ms. Sombo for the State

Mr. Nyongesa for the accused person

JUDGMENT

The accused was indicted of murder contrary to Section 203 of the Penal Code. At the commencement of the trial it was alleged that on 20.9.2016 at Matsangoni Kona Mbaya village within Kilifi County, jointly with others not before court he murdered **Harrison Mwandeje Tinga.** He pleaded not guilty. The defence was conducted by Learned counsel **Mr. Nyongesa** whereas **Ms. Sombo**, prosecution counsel represented the state.

The prosecution called seven witnesses to testify and at the close of their case accused was placed on his defence. He relied on his evidence on oath in answer to the charge.

The first witness was on **Mary Dama Mwandeje (PW1)** wife to the deceased. Her testimony was to the effect that on 20.9.2016 after super, each retired to their respective rooms for a quiet night sleep. In a later hours **Kahindi**, their uncle visited; and she was the first to welcome him by providing a chair to sit. At the same time the deceased woke up and joined him in the sitting room. That time **Kahindi** requested the deceased that they could go out to have some palm wine. They went picked the palm wine and sat in the house to partake the drink.

Further PW1 narrated that it did not take long upon entering her bedroom when a big bhang was heard from the direction of the deceased. This time round she was the first responder. On arrival, the deceased had been cut with a panga inflicting the neck and back, apparently **Kahindi** had left the house.

According to the witness (PW1), she made reference to what might have been the motive of **Kahindi** killing the deceased in her estimation, it all had to do with some allegations that both of them had bewitched **Kahindi's** child who earlier had fallen sick and unfortunately passed on. That being a clan issue, she was under the impression that a meeting held to that effect had resolved the grudge.

On cross-examination the witness testified that she has known **Kahindi** since childhood and more specifically he is also a neighbor. On the day of the attack she recollected having positively identified him as she went to open the door and to give him chair to sit as he awaits for the deceased.

She was also able to recognized him when they came back with bottles of palm wine to take in the house. On that same fateful night when shown some of the recovered clothes **Kahindi** was wearing (PW1) confirmed positively each of them to render credibility, as to his presence at the scene.

> **PW2 Kalu Naunga Munga** testified as a neighbor to (PW1) and did tell the court that around 1.00 am on 20.9.2016 she heard someone knocking at his door. In response he met one Katana who conveyed the sad news on the death of the deceased. He walked to the deceased house only to be confronted with the incident of a man whose body had injuries to the neck. Prior to this assault the witness also testified that there had been along simmering dispute between the **Kahindi's** family with the deceased over allegations of witchcraft. This was escalated with a performance of some rituals which pointed at the deceased and his wife being involved in bewitching the accused's child. That to him was the motive why the accused went for the deceased life.

PW3 Katana Kea Kunde also a neighbor to the deceased happened to be woken up by a phone call from his brother **Tuiga** to inform him of the deceased death. He therefore visited the home, only to confirm the crime of murder having taken place.

PW4 Salim Kalu Naunga, testified as one of the mourners who attended the burial of the accused child. Before the body could be interred he saw some cultural rituals being performed by spraying some substance to the body. This was going on as the pastor was also delivering his final prayers to finalize the burial rites. Thereafter, PW4, heard that the deceased has been killed.

PW5 Juma Iha a palm wine seller testified to the effect that on 20.9.2016 at about 8.00 p.m., the deceased went to his club and bought the wine to go and drink with his visitor at home. He therefore sold the palm wine as ordered by the deceased who paid Kshs.300/- for it. It did not take long before he could hear screams from the deceased home, and on rushing to the scene it was the deceased on the ground with fatal injuries to the neck.

PW6 Baraka Mwandaje testified with regard to issues on witchcraft allegations from the accused family against the deceased. The witness added that there were even clan meetings held trying to resolve the issue that the deceased and his wife had nothing to do with the death of the child nor the 'dreams' of the wife of the accused.

He felt that was the cause why the accused killed the deceased.

PW7 Rtd Wilson Kasambo Police Officer No. 37859 testified that on 21.9.2016 in company of the OCS Kilifi they visited a murder scene at Matsongoni. Its at that scene they found the deceased with cut wounds to the neck and a quick inquiry with the wife (PW1) provided some leads on how the deceased met his death. The body was collected from the scene to the mortuary. A search of the accused was mounted to effect arrest. In the course he also recovered some clothes worn by the accused on the night of the murder duly identified by the wife (who testified as PW1). He produced the reflector jacket as an exhibit and the post-mortem report.

At the close of the prosecution case, accused person was placed on his defence. In his unsworn statement he denied killing the deceased. His best recollection of the 20.9.2016 was the routine endeavors of collecting the milk which he sold to various customers using his motorcycle. It was at the time of his errands a telephone came in informing him of the death of the deceased.

He called witness is **DW2 – Baraka Kazungu** testified that on 20.9.2016 they spent most of the time with the accused. However, at 11.30 p.m. he received telephone call from the clan elder – **Alex Kenga** that the deceased has been murdered.

DW3 – Alex Kenga the clan elder being referred to by DW2 testified that on 20.9.2016 he heard screams from the home of the deceased. He therefore decided to walk to the home, only to confirm the death of the deceased arising from the injuries he saw inflicted at the neck.

At the conclusion of the trial Learned counsel Mr. Nyongesa submitted that the crux of the witnesses testimony was that the accused killed the deceased. He observed that the evidence as rendered on identification did not rise to a level of a case proved beyond reasonable doubt. According to Learned counsel the accused was not at the scene to introduce him as the perpetrator of the crime.

Analysis and Determination

At the heart of the grid of this trial are the ingredients of Section 203 of the Penal Code. For present purposes the prosecution must establish beyond reasonable doubt the following elements:

(a). The death of the deceased.

(b). That the deceased died unlawfully.

(c). That the causing death the perpetrator was actuated with malice aforethought.

(d). That much is plain from the evidence that the accused in Court is positively identified being at the scene as to time, and date of the crime.

I will deal with each of these in the context of this case namely the existence or non-existence of facts to proof the charge of murder beyond reasonable doubt, I must bear in mind that the burden of proof rests always with the prosecution and it has never and would never shift to the accused person. It is only few exceptions an accused person may be called upon to explain matters which are within his or her personal knowledge as provided for in Section (111) of the Evidence Act.

Dial is the dictum in the case of **Kioko v Republic {1983} KLR 289 {1982 -1988} 1KAR the Court of Appeal** stated interalia:

"That the Law does not require the accused to prove his innocence, and therefore it is erroneous for a court to refer to certain acts and omissions of the accused as being inconsistent with his innocence."

Further by implication motive provided for in Section 9 (3) of the Penal Code is immaterial as a criterion to commit a crime in **Karukenya & 4 others v R {1987} KLR 458** the Court stated that:

> ***"The prosecution is not under a duty to prove motive in so far as the duty to proof the charge against the accused person is concerned. The criminal responsibility of accused person on mensrea and actus reus are the great bulwarks of the rule of Criminal Law."***

A claim cannot therefore be made that one killed A for the reason that he or she practices witchcraft. Thus no form of defence of motive would issue in favour of the accused to exonerate him or her of criminal culpability. The propositions as taken by the Court of Appeal in **Libambula v R {2003} KLR 683 2EA 547** stated the correct test in the definition as follows:

> ***"Motive means that which makes a person do a particular act in a particular way. Motive exists for every voluntary act. Motive is not material in criminal liability, unless it is expressly declared to be so by the definition of the offence. A good motive cannot make lawful an evil act."*** **(See also Text on Criminal Law by William Musyoka 2nd Edition Law Africa Pg 85)**

In the matter of the prosecution against the accused it is not disputed that the deceased once alive on 20.9.2016 is dead. The prosecution placed reliance on the testimony of PW1 as corroborated with that of PW2, PW3, PW4, PW5, PW6 and PW7 who attest to the particular issue on the death of the deceased. The post-mortem admitted by consent of both counsel as exhibit 1 does not doubt on the person duly identified and substantial cause of death. The accused likewise has also as the victim of the murder. That therefore rests this ingredient as having been proved beyond reasonable doubt.

(b). I now turn to the element of death being unlawfully caused. Unlawful killing can be as envisaged in our Criminal Justice System where an act or an omission results in the death of another human being. The test is for the prosecution to establish the causal link between the unlawful act and the outcome of death. Some of the issues on causation of fact are as discussed under Section 213 of the Penal Code.

The but for test under this section is the starting point of establishing whether the deceased died out of an unlawful act. It is upon the prosecution to demonstrate that there was no ***novus actus interveniens*** which justified the unlawful act or omission by the accused when he assaulted the deceased. That is why **R v Pagett {1983} 76 CR Appeal R 279:**

> ***"Simply that in Law, the accused's act need not to be the same cause or even the main cause, of the victim's death, it being enough that his act contributed significantly to that result. There can, we consider, be no doubt that a reasonable act performed for the purposes of self-preservation, being of course itself an act caused, by the accused's own act, does not operate as a novus actus interveniens for present purposes, we can see no distinction in principle between an attempt to escape. The consequences of the accused's act, and a response which takes the form of self-defence against the act of the accused causes the death of a third party, we can see no reason in principle why the act of self-defence being an involuntary act caused by the act of the accused should relieve the accused from criminal responsibility for the death of third party."***

The rationale underlying this element is a morally based system of Law that those causing harm intentionally for a particular result not excusable or justified for the death of another human being are guilty of a crime of homicide.

I would like to point out that on 20.9.2016 the deceased and his wife (PW1) had already gone to sleep when the accused woke them up for the purpose of inviting the deceased to spend time with him for a drink. The palm wine was bought from **PW5 – Jumaa Iha** by the deceased at about 8.00p.m. According to PW5, on or about 11.00p.m., he heard screams from (PW1) that the deceased has been hacked to death. The autopsy conducted revealed that the deceased did not die accidentally, or from illness or natural cause but for the serious injuries inflicted upon the neck.

The accused in his defence and the witnesses he called to support the alibi defence denied that he was ever at the scene of the murder. However, from (PW1) testimony its established that the accused person was the last person to be with the deceased at his home partaking of the palm wine. It is not clear at what time he parted ways and the break in the chain permitted a third person to enter into the homestead to inflict the alleged fatal injuries. The sequence of events from the time accused person went to the home of the deceased, and the door opened for him that night by the wife of the deceased (PW1) upto the time screams were on air on the death of the deceased there has been no intervening factor to displace him from being at the scene.

The court will be right in drawing a presumption of fact that the accused was the one who killed the deceased. In the text by **P. Ramanatha Aiyar's (Advanced Lexicon)** the term presumption has been defined as under:

> ***"A presumption is an inference as to the existence of a fact not actually known arising from its connection with another which is known. A presumption is a conclusion drawn from the proof of facts or circumstances and stands as establishing facts until overcome by contrary proof. It is a probable consequences drawn from facts; either certain, or proved by direct testimony, as to the truth of a fact alleged but of which there is no direct proof. It follows, therefore, that a presumption of any fact is an inference of that fact from others that are known."***

The rules of evidence demand that in this case the accused be held accountable to explain the circumstances the deceased might have been assaulted given the fact that during his last minutes of the day he has been positively identified to be at the scene.

In the known state of things, accused person has failed to controvert the objective descriptions presented by (PW1) to demonstrate circumstances leading to the death of the deceased. The defence by the accused does not negate the aspect of the killing of the deceased in the night when he was apparently drinking palm wine with the deceased. As for the prosecution, the onus cast upon them to proof that the deceased unlawfully died has been discharged to the required standard of proof.

(c). Malice aforethought

Admittedly, murder as an offence is not complete without proof of malice aforethought culpable homicide as defined under Section 203 of the Penal Code positions the element of malice aforethought to distinguish it from other homicides. In Kenya malice aforethought is defined pursuant to the provisions of Section 206 of the Penal Code:

The section emphasis manifestation of malice to include intention to cause death or to do grievous harm or knowledge that the act causing death will probably cause the death of some other person….."

The doctrine of subjective and objective test as it stands with malice aforethought was explored by **Gordon Gerald**:

> ***"Subjective and objective mensrea {1975} 17 Crim L. Q 355 where he made the following statement. "What is important in the context of proof of mensrea is that certain objective descriptions of actions are in themselves descriptions of intentional actions, so that once the crown has proved what happened they have established their case, and need not go on to prove separately the existence of some particular event or condition in the agents mind. In these case proof of the external behavior is proof that he was acting intentionally, his only defence, unless of course he can show he was not a voluntary agent, is to show that the objective description offered by the crown is incorrect, by producing witnesses who describe as an accident what the crown witnesses describe as intentional by showing e.g. that he did not push the victim but accidentally fell against him. We resort to the reasonable man in an endeavor to make it possible for the crown to prove mensrea. We stress that the reasonable man is only a tool to help us discover the accused man's state of mind that the Law goes no further than to entitle the jury to apply to conclude that the accused had the mensrea of the reasonable man, and that they are not obliged so to conclude. But very often we have nothing other than the reasonable man to guide us, so the difference between the position, I have just described, and a rule that the accused may be held to have acted with a particular intent, if any reasonable man must have had intent, is not a real one.***

It is sufficient to say that mental element required by Section 206 of the Penal Code can be equaled with the broad guidelines in the case of **Tubere s/o Ochen v R {1945} 12 EACA 63** where the facts to the case weighed with the offence answers the following:

> ***"The weapon in possession of the accused while carrying out the intention, the manner in which it was used to strike the human being whether one off blow or violent multiple blows, the conduct of the accused in fleeing from the scene afterwards, the permanency or dangerous severity of the bodily harm and that cumulatively the death of the deceased must ensue from the bodily harm intentionally inflicted."***

In assessing weight to be given on intention as an element of murder the relevant circumstances must be considered whether the accused foresaw the risk of the voluntary act he was about to carry out of inflicting harm against the deceased and using a dangerous weapon.

Whether the accused was able to foresee the real or substantial risk and the consequences of targeting the neck of the deceased to do grievous harm.

A similar statement of Law at that stage of intention was made in the persuasive case of **S v Sigwahla 1967 4 SA 566** the court said:

> ***"The expression intention to kill does not in Law, necessarily require that the accused should have applied his will to compassing the death of the deceased. It is sufficient if the accused subjectively foresaw the possibility of his act causing death and was reckless of such result. This form of intention is known as a dolus eventualis as distinct from dolus directus."***

In the instant case, the circumstantial evidence stems from the time accused person visited the home of the deceased at night on 20.6.2016 under the pretext that he wanted his company to enjoy a bottle of palm wine. Then comes the actual unlawful act of taking a panga and inflicting a fatal wound around the neck part of the body. There just was no time between the time of the murder and when (PW1) came out of the bedroom to save his life by taking him to the hospital. That cut wound occasioned instant death and the accused whom (PW1) expected to be at the scene had already taken flight. The unlawful act targeted the neck because of its vulnerability and the accused foresight was that death will ensue of his victim. The defence does not address the fact that in violently assaultive the deceased he did not intend to cause death or grievous harm. The accused therefore from the circumstantial evidence must reasonably have foreseen that death. Could intervene as a result of the use of forearmed with a sharp object to inflict the injuries. This injury as described by the pathologist in the post-mortem report was sharp cut wound by a sharp object which went through the neck with massive injury to the main vessels of the neck and muscles, injury to the cervical spinal disrupting the spinal cord. With this the deceased died of massive hemorrhage, secondary to assault.

The **Court of Appeal in Karani & 3 Others v R {1991} KLR 622** held:

> ***"Malice aforethought is deemed from the nature of the injuries caused on the deceased and the weapons used the postmortem put in evidence showed deep injures to the head of the deceased which had caused death due to shock due to hemorrhage due to skull fracture due to cut wounds on the head and face."***

In this matter as regards to the element of malice aforethought, the test as provided for under Section 206 (a) (b) of the Penal Code in the circumstances of this case has been proved beyond reasonable doubt.

There is further irresistible inference in balancing the threshold factors on circumstantial evidence propounded in **Simon Musoke v R {1958} EA 715, Rex v Kipkereng Arap Koske & Another {1949} 16 EACA 135,** The facts and evidence are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. That burden was restfully cast upon the prosecution and it has successfully disapproved the innocence of the accused.

The inference I draw on both quantum and quality of the evidence analyzed from the prosecution and the defence drives me to draw inference that the accused committed the offence of which he was arraigned and tried by this court.

The result I enter both verdicts of guilty and conviction in terms of Section 203 of the Penal Code for the offence of murder.

Sentence

It is aggravating that the accused person perpetrated a serious crime involving loss of life which is sacrosanct. Indeed, murder is a heinous crime in that it is morally inexcusable and deplorable. It has been said, time and again that the courts have a duty to protect the sanctity of human life.

By nature of the evidence, the murder was premeditated in that the accused person took his time to meticulously plan before executing it. The degree of cruelty and lack of respect for human life exhibited is shocking. The manner of execution was cold blooded, callous and cowardly. The public should be made aware of the fact that those who commit murder under the guise of a belief in witchcraft commit a very serious offence deserving a lengthy prison term. This is so because such beliefs are weird and held by irrational people. Trying to make sense out of their deeds is ignominious.

What is more disturbing in the instant matter is that the accused person killed a person who had done him no wrong. It appears the motive for the murder was premised on the delusional belief that the deceased had bewitched his child. In that regard the sentence should reflect the revulsion of the society at the readiness to resort to violence, the horror of society that human life should be made so cheap, and the need to show the accused and other potential offenders that the price they must pay dearly for resorting to murder in order to eliminate an alleged witch or wizard from their midst is not worth it. I have not found any mitigating circumstances in this matter.

For these reasons, the court finds that the accused person moral blameworthiness is of the highest order. Accordingly, accused is sentenced to 28 years' imprisonment.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 18TH DAY OF JUNE, 2020

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R. NYAKUNDI

JUDGE

In the presence of

1. Ms. Sombo for the state

2. Mr. Nyongesa for the accused person