



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT MALINDI**

**CRIMINAL CASE NO. 1 OF 2019**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**PASCAL KITHI JOHN.....ACCUSED**

**Coram: Hon. Justice R. Nyakundi**

**Ms. Sombo for the state**

**Mr. Kariuki for the accused person**

**JUDGMENT**

**Brief Facts**

The accused person in this case, **Pascal Kithi John**, is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge are that Pascal Kithi John, jointly with others not before this Court, on the 26<sup>th</sup> November 2018 at Mkunguni Village in Kijiwetanga sub-Location in Malindi Sub-county within Kilifi County, unlawfully murdered **Kadzo Chengo Kithi**. On 17.1.2019, the accused denied the charge when he appeared for plea taking before **Hon. Justice W. Korir**.

In an effort to prove the charge against the accused person, the prosecution called four witnesses, upon whose evidence the accused was put on his defence. He gave sworn evidence. Upon closure of both the prosecution and defence evidence, **Ms. Sombo** for the Director of Public Prosecutions as well as the accused's advocate, **Mr. Kariuki**, opted not to tender any submissions.

It is upon the evidence on record that I am obligated to evaluate, make my own findings and come to a conclusion on whether the accused is guilty as charged or not.

**The Evidence**

**PW1 Beatrice Charo** testified that the deceased was her mother and that she knew the accused as he was a child to her cousin. She stated that on the material day she was at home with the deceased when the accused came home carrying a bag and a sack and that he had a panga inside the sack. The accused then harvested coconut which he brought to the deceased. The accused then prepared Tamarind juice and then looked for a friend to prepare the coconut, the friend's name was Robert. They parted ways at 5.30pm, she remained behind the house while the accused called the deceased to count the coconut. He then went with the deceased to where the coconuts were being kept. She testified that when she followed them she saw her mother lying on the ground having suffered multiple injuries. She called out her name and at the same time screamed for help. She testified that there were people who responded and they took the deceased to Malindi Hospital. She stated that the accused was the last person to be seen with the deceased and she identified the accused.

**On cross-examination PW1** stated that she had recorded a statement with the police on this matter which she signed although the police officer was the one writing it. She produced her witness statement marked as **DMFI-1**. She testified that there were two people who came to the house and they had Rastas (Dreadlocked hair) and the second one was Peter, her mother's son. She stated that she could identify the Rasta man if she is shown his whereabouts. She testified that they were partaking palm wine and that she had slaughtered a chicken and served them. She stated that they left the home after the murder. She also testified that she did not hear the incident neither did she see the accused assault the deceased. She also stated that she was not aware of any dispute between the accused and the deceased and was not sure whether the panga she had earlier seen was the murder weapon. She stated that she estimates that the deceased died at 6.00pm. she further testified that she did not see the accused leave the homestead. She also stated that the deceased had previously explained to her that she was being accused of witchcraft.

On re-examination she stated that she knew Rasta as one of the two people who came home that day. They left at 4.15pm that was before the death of the deceased.

**PW2 Ferdinand Maitha** testified that he was a business man and the deceased was an aunt to his wife. He stated that he knew the accused who was a child to his in law and a nephew to the deceased. He stated that PW1 was a niece to his wife. He stated that on 26. 11. 2018 at 6.00pm while he was at home with his wife, he heard screaming and distress calls coming from the direction of the deceased. Together they proceeded to the scene where they learnt on arrival that the deceased had been attacked. They saw the deceased, a lady they know, had been cut at the neck. He then telephoned David who works with the Military who then advised him to call the police. The police arrived and carried the body away. He stated that there had been rumors that the deceased practiced witchcraft.

On cross examination he stated that he had not mentioned in his witness statement that he had been with his wife and that he had gone to the crime scene accompanied by his wife. He stated that he did not see the accused at the crime scene.

**PW3 Dr. Fidya**, testified that he was a Medical officer stationed at Malindi Hospital and he was the one who had carried out the Post mortem examination on the body of the deceased. He stated that the general observation was that of an African female of good nutrition status. He stated that rigor mortis had already set in and there was an external deep cut wound extending from the right side of the neck. He also stated that there was a small skin herma and the nervous system had been completely disconnected with the neck. He stated that it was his conclusion after the examination that the deceased had died of hemorrhagic and neurogenic shock. He produced the post mortem report as Exhibit 1.

On cross-examination he stated that he had done the post mortem 10 days after the offence was committed and that he was not able to ascertain the bleeding. He also stated that the bleeding was from the neck and he saw the body parts and there was no other abnormality.

**PW4 P.C Robert Langat** the Investigating Officer stated that after receiving the murder report on 26.11.18; at around 2100 hours at the Police Station from a member of the public, he proceeded to the scene where he found a woman aged about 50 years whose head had been chopped off. She was lying in a pool of blood. He stated that they carried the body from the scene and had a post mortem carried out. The body had been identified by the family. On the 19.12.2018 he received the witness statements and arrested the accused person. The accused was charged with the offence. He stated that from the witness statements the deceased had refused to grant permission for the harvest of the coconut and the accused had alleged that the deceased was a witch. He positively identified the accused.

On cross-examination, he agreed that permission to harvest the coconut had been granted and that the accused was a law abiding citizen and that he did not know how many coconuts were harvested. He stated that the deceased was lying in a pool of blood and she was holding two coconuts and she still had her clothes on. He admitted that the murder weapon was never recovered and they were unable to establish what kind of weapon was used. He was also not aware of the **Rastaman** mentioned by **PW1**. He stated that the murder scene was an open homestead and members could pass and move freely behind the house. He also stated that there were no crime scene photographs taken and the scene of crime was not circled neither did he draw a sketch plan of the scene. He stated that he was the one who arrested the accused at Kurunzi on 19.12.2018.

### **The Defence Case**

At the close of the prosecution case, the accused was placed on his defence.

**DW1 Pascal Kithi John**, the accused testified that he was a standard 7 pupil at Majivuni Primary school. He stated that on the material day he was at his aunt's house Joyce Kithi Chengo and he left at about 10.00am for Mkunguni. He met two Rasta men drinking alcohol and his aunt **Beatrice Charo** was at home. His stated that his uncle **Peter Charo** was the one serving the alcoholic drinks and they exchanged greetings. He stated that he was asked to harvest coconut so that they could be used to cook vegetables. He stated that he asked one **Peter Mainge**, his uncle, to climb the palm tree and harvest the coconuts, who agreed to do so but after he cuts grass for the cow. He testified that he offered to cut the grass on his behalf while Peter Mainge harvests the coconut. He stated that his uncle was carrying a sack and panga to cut the grass while he was carrying a bag with a trouser inside it. The trouser had been for purposes of adjustment. He then went to cut the grass as his uncle harvested the coconut. He stated that he packaged the grass in the sack and handed over the grass and panga. He then proceeded to break the coconuts shell to remove the coconut. Once he was done he went and placed them in the house and then his aunt, **Shida Chengo**, came into the house and they exchanged greetings. He stated that other than the two Rastamen drinking the palm wine there was a third person who joined them. He stated that he went to where he had kept the coconuts at took ten of them and went back to the front side of the house where he found the Rastamen still drinking alcohol. He stated that he did not see his aunt Beatrice. He bid them farewell and left his grandmother's house. He then went to back to his aunt's home. After a few days his father came and informed him that he was being summoned to the police station over the death of the deceased. He arrived at the police station where he found PC Langat who then talked with his father. He was surprised that the police arrested him and placed him in custody and he was charged with an offence he did not commit.

On cross examination by **Ms. Sombo** for the State, the accused stated that in 2018 he was in class 7 at Majivuni Primary School and he used to stay with his aunt Joyce Chengo but when schools closed he would go to live with his grandmother **Saida Chengo** alias **Kadzo Chengo** at her home in Mukunguni. He stated that he knew PW1, Beatrice who used to live with them at Mkunguni but she moved. He stated that he used to go back to Mukunguni after when school closed and the people in the village knew him and he knew the neighbors. He stated that the deceased was his grandmother. He stated that on that material day he arrived at Mukunguni at 10.00am and found two Rastamen he didn't know taking alcohol. They were being served the alcohol by Peter Charo. He stated that the deceased came home at 10.00am and that he was assisted by Patrick to harvest the coconut. He stated that he went to the rear of the house where the coconut trees were, together with the deceased. He counted the coconuts when the Rastamen were still present at 4.00pm while he was still at home. He stated that he saw someone else enter the compound.

On Re-examination by **Mr. Kariuki** for the accused, he stated that he was arrested at the Police Station and that he was in the company of his father. He stated that he had no grudge with the deceased and was not aware of any dispute with the deceased. He clarified that the

coconuts were outside the house and he walked with the deceased besides the house and that he must have been seen by one of the neighbours. He stated that he went to cut grass on behalf of Patrick and there was no other panga except Patrick's.

**DW2 John Njenga** testified that he works in Lamu and the accused is his first born son. He stated that he received a phone call on 4.12.2018 informing him that the deceased was dead. He arrived back home on 10.12.2018 and met his cousin who informed him that a report had been made at the police station. He took his son to the police station to record a statement. Whereupon the accused was placed in custody and charged with the offence. He stated that the accused had a cordial relationship with the deceased.

On cross examination by **Ms. Sombo** for the State, he stated that he was told about the head cut and that he was not at home during the murder. He stated that he had been asked to take all persons who were at home during the murder to the police station. He stated that he had a good relationship with the deceased and that the accused did not attend the burial of the deceased.

The defence closed its case.

## **Desposition**

The offence of Murder is defined in Section 203 of the Penal Code, thus:

***“Any person who of malice aforethought causes death of another person by unlawful act or omission is guilty of murder.”***

Section 206 thereof defines the meaning of malice aforethought as

- (a) An intention to cause the death or to do grievous harm to any person whether that person is the person actually killed or not.***
- (b) Knowledge that the act or commission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not.***

To prove the offence of murder, the prosecution is mandated to prove the following ingredients:

- (a) The fact and cause of death of the deceased person***
- (b) That the death of the deceased was as a result of an unlawful act or omission on the part of the accused person.***
- (c) That such unlawful act or omission was committed with malice aforethought.***

In a case depending exclusively on circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt – **Mwangi –vs- Republic (1983) e KLR and Republic –vs- Daniel Musyoka Muasya & 2 Others (2014) eKLR**. Further, the degree of proof of a murder trial is beyond any reasonable doubt – **Bhatt –vs- Republic (1959) EA 332**.

In the case of **Abanga alias Onyango –vs- Republic Cr. Appeal No. 32 of 1990 (UR)** the Court of Appeal rendered that:

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

- (i) The circumstances from which any inference of guilt is to be drawn, must be cogently and firmly established.***
- (ii) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused.***
- (iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that with all human probability the crime was committed by the accused and no one else.”***

Section 203 of the Penal Code provides that:

***“any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”***

Section 206 of the Penal Code on the other hand sets out the circumstances which constitute malice aforethought. In light of the above provisions, the prosecution in this case must prove:-

- (a) The death of the deceased and the cause of that death***
- (b) That it is the accused herein who caused that death by either an unlawful act or omission and***
- (c) That in causing the death of the deceased, the accused had malice aforethought***

The above will constitute the issues for determination in this case.

**(a) The death of the deceased and the cause of that death**

The evidence on record by all the prosecution witnesses shows that the deceased died on 26.11.2018. **Dr. Fidy**a testified that he had carried out post Mortem examination on the body of the deceased **Kadzo Chengo Kithi** at the Malindi Hospital mortuary. This was some 10 days after the deceased's death on 26.11.2019. **Dr. Fidy**a pointed to a deep cut wound injury extending to the right side of the neck as well as a total severing of the nervous system, complete disconnection with the neck. In his opinion, the deceased's death was caused by hemorrhagic and neurogenic shock. The post mortem report confirming the death of the deceased was produced as **PExhibit 1**.

There is therefore no doubt that the deceased died. There is also no doubt as to the cause of that death of the deceased being hemorrhagic and neurogenic shock due to the complete severing of the nervous system at the neck-decapitation.

I will now move to the next issue for determination.

**(b) That it is the accused herein who caused that death by either an unlawful act or omission**

In the case of **Republic –vs- Taylor Weaver and Donovan (1928) 21Cr. App. R. 20** the court stated that;

***“Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence, to say, it is circumstantial.”***

From the above evidence on record none of the Prosecution witnesses saw the accused murder the deceased. That leaves this Court with no option but to make reasonable deductions from the available circumstantial evidence taking into consideration the fact that the Accused being an interested party may have lied to save himself.

Another issue which has to be determined in this case is that of identification. The courts have **held (See Joseph Ngumbao Nzaro v Republic {1991} 2KAR 212)**, and rightly so, that in a case where the evidence for the prosecution rests on the identification of the assailant by whatever number of witnesses be it by way of identification of a stranger” or the recognition of a close relative or friend, the court must be careful to properly direct its mind to the condition prevailing at the time of the identification. The court must also consider the length of time for which the witness had the accused under his/her eye. The purpose of this careful consideration is to eliminate the possibility of error which is bound to happen even in cases where the person under observation is a close friend or relative.

Further no evidence was adduced in court as to the whereabouts of the murder weapon. Thirdly, there seem to have been two people who featured prominently in this case and who unfortunately are not before the court. These two **“Rastamen”** that PW1 says to had been in the compound but are not before this court raise a serious doubt in my mind as to the guilt of the accused person.

However, the question I ask myself is whether the fact that the accused did not attend the burial of the deceased, who was his grandmother whom he claimed to have had a cordial relationship with is an indicator of his guilt. There was no evidence adduced on the whereabouts of the accused during his grandmother's burial.

I am however not convinced by the PW1's testimony and as such I find that the Prosecution has not proved its case in this regard. It has not been proven beyond reasonable doubt that the Accused was the one who caused the unlawful death of the deceased. I have evaluated the entire evidence and there is no direct evidence that it is the accused who killed the deceased. The prosecution case is founded on circumstantial evidence. On that said date the deceased was not alone in the compound with PW-1 and the accused, there were also two Rasta men drinking traditional palm wine within the compound of the deceased. house of the accused, she was not only with the accused person. She was with other two persons whose identity was not disclosed by PW-1 or any of the other Prosecution witnesses. It is therefore not correct to state that the accused was the last person seen with the deceased alive.

The prosecution case shows that other than the accused person, there are other persons who equally had the opportunity to kill the deceased, who were not exonerated from suspicion of having committed the offence by the prosecution, so as to leave the evidence pointing unerringly towards guilt of the accused. As such the evidence against the accused only raises grave suspicion against him, of which as was rightly pointed out in the case of **Neema Mwandoro Ndurya versus Republic [2008] eKLR**, suspicion however strong cannot provide a basis for inferring guilt which must be proved by evidence.

There were also other witnesses who were with the deceased, whose names are given as **Peter Charo**, the son of the deceased and **Patrick Mainge**, the one who climbed up to pluck the coconuts were not called as witnesses. The prosecution has failed to call the two witnesses and have not given any valid reason why they were not called. It is not clear whether it was disinterest or sheer laxity in availing key witnesses. From the proceedings it is not clear why the two were not called and yet they were competent witnesses as provided under **Section 125 (1)** of the **Evidence Act** which states:

***“All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions by tender years, extreme old age, disease (whether body or mind) or any similar cause.”***

**Section 128** of the Act provides:

**“A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceedings.....”**

From the foregoing; I am satisfied that the Prosecution failed to prove beyond reasonable doubt that the Accused did the unlawful act which caused the death of the deceased which constitutes the ‘actus reus’ of the offence.

**c. That in causing the death of the deceased, the accused had malice aforethought**

“Malice aforethought” describes the *mens rea* required for conviction of murder. If malice aforethought is lacking the unlawful homicide will be manslaughter.

It is the duty of the prosecution to prove the accused’s guilt beyond any reasonable doubt. In my considered opinion, that the burden of proof has not been discharged satisfactorily.

Having found no evidence to connect accused to the unlawful act that resulted in deceased’s death, it would be futile to delve into the issue of malice aforethought.

With the above principles in mind, the prosecution has not proved its case against the accused beyond all reasonable doubt, as the ingredients of the offence of murder as set out under Section 203 of the Penal Code have been proved. I find that the prosecution has not proved the ingredients of the offence of murder as set out under Sections 203 and 206 of the Penal code. The circumstantial evidence is too weak to meet the threshold for a guilty verdict.

It is a pity that the deceased died such a horrible death but the prosecution needed to do more than what it did in establishing the persons behind the death of the deceased. The burden of proof in criminal cases never shifts from the prosecution. It was therefore not the duty of the accused herein to exonerate himself from the allegations he could have chosen to say nothing in response to the allegations. The result in my view would have been the same that the prosecution evidence herein was too weak to support the case against the accused.

Consequently, I have come to the conclusion that the State has failed to prove its case beyond reasonable doubt. Accused is found not guilty of the offence of murder and he is accordingly acquitted. Accused shall be set at liberty unless otherwise lawfully held.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 24<sup>TH</sup> DAY OF JULY 2020**

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**R. NYAKUNDI**

**JUDGE**

1. Mr. Gicharu holding brief for Kariuki for the accused