REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL CASE NO. 1 OF 2016

REPUBLIC ..... PROSECUTOR

VERSUS

JUMAA KAVIHA KALAMA NDOLO ..... ACCUSED

Coram: Hon. Justice R. Nyakundi

Miss. Sombo for DPP

Mr. Gicharu for the accused

JUDGEMENT

The accused was charged with the offence of murder contrary to Section 203 of the Penal Code as punishable in terms of Section 204 of the Penal Code.

As the accused pleaded not guilty the prosecution was under a duty to proof the elements of the offence beyond reasonable doubt. In his trial **Mr. Gicharu Kimani** advocate provided legal representation on his behalf whilst **Ms. Sombo** prosecuted the case on behalf of the state.

The trial of the accused involved the summary of eleven witnesses required to proof the following elements beyond reasonable doubt:

a) That the death of the deceased occurred and it was unlawfully canoed.

b) That the underlying crime of murder was committed with malice aforethought.

c) That the accused participated in the murder in such a manner that he was the substantial cause of the death of the deceased.

A contextual of the evidence for the prosecution case **PW1 – Kazungu Kahindi Baya** testified as the son of the deceased in effect with the events of 25th September, 2015 when he attended a burial of a relative at a neighbouring home. The following day he went back to their home and at about 8.00 p.m. the accused and one **Kahindi** seeking to meet the deceased. The deceased together with the accused and **Kahindi** left on a motorcycle and were expected to return shortly states the witness. Further, PW1 also decided to leave the home to the adjacent home where he attended a burial. However before leaving he heard some screams accompanied with the following words *"Fulani anachomwa huko (chini)"* someone is being burnt. At the scene (PW1) saw the deceased, his father covered with a blanket and body under fire. Thereafter the police were informed and did visit the scene the following day.

PW2 – Furaha Kahindi, another son of the deceased testified that he happened to be at home with the accused when his brother **Kahindi,** and came looking for the deceased so as to talk to him for a moment. As they came in riding a motorcycle they left with the deceased with a promise that he will be back accused said *"Twaja naye hivi baba yenu"* (meaning we are just coming with your father). It occurred that the accused never came back with the deceased but (PW1) was confronted with the information instead he had been burnt to death.

PW3 – Zawadi Barisa told the court that during the course of the evening of 26th September, 2015 while at home the accused Kahindi, Kaviha , and other brothers came to their home riding a motorcycle asking to see the deceased. Further PW3 gave evidence that the deceased who was asleep woke up and left with the accused and his brother riding a motorcycle. According to the testimony of PW3 at about 7.00 p.m. while at the home of B people started screaming and mourning that the deceased had been killed.

PW4 – Boniface Kahindi Baya - another son of the deceased who resides in Mombasa stated that on 26th September, 2015 he travelled home to attend a burial of a relative. On arrival at his home he spent some visiting and discussing with his father, the deceased, particularly on allegations going round in the village that he had killed one 'B'.

According to **PW4** on or about 7 p.m. information was received at the home where he went to console the family that his father has been burnt to death. When he visited the scene he was able to confirm the tragic event upon seeing the body of his father.

PW5 – Jumwa Kahindi – the widow of the deceased testified that in the morning of 26th September, 2015 she left their home to attend a burial of a grandmother. In the evening at their home she did not find her husband but the children told her that he has gone to treat **K's** child – B. While at the burial of her grandmother, an announcement was made that B had also passed on and this caused them to rush to that family's home to offer condolences.

According to PW5 as they viewed the body of the dead child with the deceased a group of youths came in carrying a jug of water demanding that he treats **(B)** deceased child **K** so that his life can be restored back.

In a little while the same group left with the deceased, only soon after PW5 to learn that he has been killed. She denied that her family had a grudge with the accused to warrant revenge by the killing of the deceased.

PW6 – Ndurya Thoya Baya told the court that he participated in identifying the body of the deceased to the pathologist who performed the postmortem at Kilifi District Hospital.

PW7 – Harrison Safari Shehe gave evidence that he owned the motorcycle registration number KMDE 282L in which the accused hired as the rider to carry out Boda Boda business. On the 30th September, 2015 he received information that the accused had been arrested in connection with the death of the deceased.

PW8 – Alfonzo Kahindi – testified that on 26th September, 2015 he had been asked to visit the scene of murder to ascertain the cause of death. In the company of **Rodger Sichenje** and **Elvis Kazungu**, it was PW8 evidence that on arrival at the scene he saw charred burnt body and the ongoing fumes of the fire. Furthering the confirmation of the incident police officers were called in to investigate the matter.

PW9 – Dr. Azrah Mohammed of Kilifi hospital gave evidence on behalf of **Dr. Kadivane** with regard to the postmortem examination carried out on 8th October, 2015. On examination it was established that the body was burnt beyond recognition. The cause of death could only be associated with extensive burns as no proper forensic findings without the limbs to base the examination.

PW10 – Baraka Mwazayi testimony was in respect of the evidence that on 26th September, 2015 he saw the deceased being brought by the accused holding a jug of water which he was required to pour on the body of B so that she can rise from the death to life. After that treatment and the child B not rising from death to life, accused and other youths took away the deceased. It was PW10 evidence that they tried to follow the procession but never managed to catch up with the accused and his group.

According to PW10 at about 7 metres from the actual scene though with some darkness he saw the accused get petrol from the motorcycle which he used to lit the fire on the body of the deceased. It is the intense fire which burnt the deceased to death.

PW11 – CPL. Fatuma Mathenya testified that under instructions from her boss she investigated this murder incident involving the accused person. It was further, evidence from PW11 that on recording the witness statements she was satisfied that the murder was committed by the accused and his brother with others not before court. On the basis of the evidence she recommended a charge of murder to be preferred against the accused.

The case for the defence

In an unsworn statement from the dock the accused denied the offence. To his recollection on 26th September, 2016 he went about the daily routine on the 26th September, 2016 when he visited a neighbour's home to console them for the loss of a family member. The following day the accused who operates Boda Boda told the court that he ferried mourners to and from to attend the burial. He was only told of the murder when the police arrested him in the course of his duties, a murder he has no knowledge of or participated in its occurrence.

In view of the prosecution case and the stand taken by the accused it is now my duty to establish whether the prosecution proved the charge of murder beyond reasonable doubt.

Analysis and Determination

In the interpretation of the offence of murder contrary to Section 203 of the Penal Code as posited elsewhere in this judgement it is necessary that all elements are proved beyond reasonable doubt as stated in Section 107(1) of the Evidence Act.

The nature and value of the evidence adduced by the prosecution as the burden bearer must be brought within the provisions of Section 206 of the Penal Code on malice aforethought. After all there can be offence of murder committed and proved without this key element of malice aforethought. The efficacy of malice aforethought shall be deemed to be established by the prospection adducing cogent evidence to proof the following elements to manifest malice in a crime of murder:

a) An intention to cause the death of another

b) An intention to cause grievous harm

c) Knowledge that the act or omission causing death will probably cause death or grievous harm to some person, whether that person is the one killed or not accompanied by indifference whether death or grievous injury occurs or not or by a wish it may not be caused. An intention to commit a felony and an intention to facilitate the escape from custody of or the flight of any person who has committed a felony or attempted it."

In the *locus classicus* of **Tubere v REX 1945 12 EACA 63** the East African Court of appeal correctly powered out as follows in the circumstances of the case which reaffirms malice aforethought:

"With regard to the use of sticks, in cases of homicide, this court has not attempted to lay down any hard and fast rule. It has a duty to perform in considering the weapon used and the part of the body injured, in aiming at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flaw more readily form the case say of a spear or knife than from the use of stick, that is not to say that the court take behavior view where a stick is used. Every case has of curse to be judged on its own facts. The same remarks applies as regards the view in court rules were a rapture spleen is the cause of death."

In the case of Petero Sentah s/o Lemandwa v r 1953 20 EACA:

"the court was faced with scenario where the deceased died as a consequence of violence inflicted on her in furtherance of committing a felony. It was held that by virtue of Section 186 of the Penal Code of Uganda on the offence of murder, the death which ensued by an unlawful act or omission done in furtherance to commit any felony malice aforethought is established and the accused is guilty of murder."

According to the persuasive authority of **Uganda v Komakech Alias Mono HCSC No. 0131/2014** the court held interalia that:

"It is not mandatory that the prosecution in discharging the burden on malice aforethought to prove the nature of the weapon used in inflicting the harm which caused death, nor is there any obligation to prove how the instrument was obtained or applied in the inflicting the harm."

Further the prosecution need not proof motive for the offence. That is the position. Pointed out in Kabiru v R 2007 1 EA 107 where the court held:

"Motive is immaterial so far as regards criminal responsibility, although it is a factor to be taken into account as part of circumstantial evidence on the culpability or otherwise of an accused person."

This court on evaluation of the prosecution case on the charge of murder against the accused was confronted with both direct and circumstantial evidence to settle the burden of proof beyond reasonable doubt as expressly stated by **Lord Denning** in **Miller v Minister of Pensions {1947} 3 ALL ER** and **Lord Sankey** in **Woolmington v DPP CA 1935 AC.**

Their Lordships emphasized that it is important for an offender or an accused person to be criminally responsible for his acts or omission, be proved beyond reasonable doubt. That means the evidence led by the prosecution to show that the accused had the prerequisite intention and also the *actus reus* of the offence, must be within this threshold.

The rule under this doctrine on the burden of proof was profoundly stated by **Glanrule Williams** in his book on Criminal Law **Stevens & Sons (1978 LPP 215 – 2VE)** In the following passage**:**

"There is no agreed mathematical translation of probable and all we can say about it, likely is that it may cover a lower degree of probability than probable, in statistics, probability means the whole range of possibility between impossibility and certainty, the degree of probability is expressed either as a value fraction or as a decimal fraction, that it is a chance of one in a hundred or that the odds are 99 to 1 against."

Therefore, the prosecution must satisfy the test in order to obtain conviction sought against the accused person. From the foregoing there are two species of evidence relied upon by the prosecution against the accused person. First, there is direct evidence of PW10 who said the accused draw petrol form his motorcycle which was used to set the deceased on fire.

Furthermore, the preponderance of evidence by **PW1, PW2, PW3, PW4, PW5, PW6, PW8, PW9 and PW11** establishes the weight and quality of evidence required of circumstantial evidence to secure a conviction of the accused beyond reasonable doubt.

In the case of **DPP Kiborne 1973 AC 729**, the court made the following pertinent observation on circumstantial evidence:

"Circumstantial evidence is particularly powerful when it proves a variety of different facts all of which point to the same conclusion. It works by cumulatively, in geometrical progression, against other possibilities and has been likened to a rope composed of several cords:

One strand of the cord might be insufficient to sustain the weight but three stranded together may be quite of sufficient strength. There may be a combination of circumstances no one of which would raise a reasonable suspicion but the three

taken together may create a strong conclusion of guilty with as much certainty as human affairs can require or admits of."

Similar sentiments on the importance of circumstantial evidence to proof the facts in issue to a criminal offence is expressly stated in the cases of **Mishi Tulo v R CR Appeal No. 30 of 2013, Sande v R (2003) 2 KLR** and **Abanga Alias Onyango v R CR Appeal No. 32 of 1990**.

In the above cases the tapestry of circumstantial evidence to point to the accused person in exclusion of others that he was, the perpetrator of the crime laid down the following criterion to be considered before a trial court can convict him for the offence. That it is settled law that when a case rests on circumstantial evidence, that evidence must satisfy three primary tests:

(i) The circumstances from which an 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 a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

It is in the light of these principles and evidence that I proceed to consider if the prosecution in this case discharged the burden of proof to the required standard of beyond reasonable doubt.

From the outset the deceased was alive upto the night of 26th September, 2015.

Earlier that fateful day **PW5 – Jumwa** the widow to the deceased stated that was at the home **K** who had lost a child by the name B. PW5 saw the accused with a group of youth behaving in an aggressive manner, holding a jug of water and the deceased forcing him to heal B, and resurrect her back to life. In fact the evidence of PW5 points at the accused and his group of youth that they immediately left with the deceased to an unknown destination.

There was also strands of evidence by PW1, PW2, PW3 and PW6 which shows that the deceased was at his home when the accused with other men drove into compound and demanded to see the deceased. PW1, PW2 and PW3 also present at the home of the deceased testified that the accused was driving the motorcycle used to carry the deceased. They asked the deceased to ride on it to the direction they were going. The prosecution evidence from PW1, PW2 and PW3 was to the effect that the accused and his youth group promised to bring back the deceased. There was no trail from these three witnesses accused living up to their promise to bring back the deceased alive. There was certainty that the deceased who accompanied the accused to some unknown location had been killed. According to PW1, PW2 and PW3 taking a walk to the alleged scene they saw the charred body of the deceased and the fumes of fire was still noticeable.

The evidence of PW7 owner of motor cycle confirmed that the accused was employed as a rider of motorcycle KMDE 282L. This same motorcycle happened to be the one used by the accused to visit the home of deceased and subsequently picked him up only to face death thereafter. In the circumstances outlined in the postmortem report the force of fire exerted to injure the deceased resulted in his body being burnt beyond recognition. The injuries sustained are consistent with the eye-witness testimony of PW10. There was also direct evidence of P10 to the effect that on 26th September, 2015 while at **K's** home and along with the family he saw the accused accompanied with some other youths pushing the deceased to do what it takes to heal the dead child B and have him resurrect to life. When they left **K's** home, PW10 followed them from behind towards the destination they intended to take the deceased. PW10 confirmed that 7 metres away from the scene where the deceased was burnt he stood at a vantage point and saw the accused collect petrol from the motorcycle and appropriately using it to light the fire which burnt the deceased.

This further evidence form **PW10** strengthens the strong circumstantial evidence from **PW1, PW2, PW3, PW5** for the findings of this court that the prosecution has presented sufficient evidence to support the unlawful act of omission by the accused to cause the death of the deceased. The coincidences of the deceased being taken to **K's** home under the pretext that he was going to heal (B) and immediately whisking him away to a place only known to accused and his co-conspirators places him at the centre of the design, plan and execution of the intention to kill or to do grievous harm to the deceased. This is contrary to the accused testimony that he was at home going about his duties of Boda Boda business until the police arrested him for no apparent reason.

In the entire trial I am impressed with the set of consistency and velocity of the witnesses regarding the involvement of the accused with the death of the deceased.

The prosecution case was that the murder of the deceased was planned based on what witnesses referred to as suspicion of witchcraft in connection with the death of B. Whereas the accused and his co-conspirators to the crime may have had their reasoning to as to the character of the deceased, they embarked on a mission to kill the deceased without any lawful excuse or justification.

The offence of practicing witchcraft is provided under the Witchcraft Act. It is an indictable offence and liable to conviction and sentence when proved beyond reasonable doubt. The accused duty was to escort the deceased to a police station for him to be charged with the offence under the Witchcraft Act. If there was evidence that the deceased was a witch or wizard what was required of the accused is a report to be made to the police station, otherwise the right to life would be diminished if at all what one needs is to allege that D or E is a witch and thereafter, people take the Law into their hands to mob lynch or execute him or her for an offence only the courts have the statutory power to hear and determine beyond reasonable doubt.

The sequence of events in this case at the very least are reasonably clear from the evidence on identification of the accused. This was evidence of recognition by **PW1, PW2, PW3, PW4 and PW5.**

All these witnesses were familiar with the accused for many years, it is equally obvious that they also know the accused very well. This was purely a case of recognition and the principles as set out in the case of **Anjononi & others v R 1976 – 1980 1 KLR 1566** apply in regard to the identification of the accused.

However, it is to be remembered that besides the circumstantial evidence of **PW1, PW2, PW3, PW4 and PW5** there is eye witness evidence of **PW10** which is cogently woven together and equally safe and free from error to place the accused at the scene.

Further the facts as shown by the brief given elsewhere in this Judgment under Section 9(3) of the Penal Code the particulars of a crime need not provide for motive as an element to be proven by the prosecution. However, there is nothing offensive in establishing motive of the offence.

In the case of **Karukenya v R 1983 (KLR 53)** the court held:

> ***"Whilst motive and opportunity are important matters to be considered when weighing the prosecution case they have in themselves be regarded as corroboration."***

Further in **R v Kersher Meza w/o Tankiwawa 1940 7 EACA 67** subject to the above principle in **Karukenya** the court held:

> ***"We appreciate of course that evidence of motive and opportunity is not of itself corroborative but such evidence in conjunction with other circumstances may constitute such circumstantial evidence as to furnish some slight corroboration in a case where the degree of criminal complicity to be contributed to the illegal accomplice is very slight indeed."***

In the instant case the question of motive becomes relevant in the sense that the accused harbored ill feeling against the deceased following the sickness of B. There is satisfactory evidence by the prosecution **PW5** that while B was on the death bed, the deceased was forced to treat her and have the life restored back by using magical power. That was never to happen and it remained an issue with the family of B that her death had everything to do with witchcraft by the deceased. It is self-evident that the deceased died because of suspicion that he used witchcraft upon the child B.

Relying on the excuse of witchcraft did not satisfy the essential thrust of the elements of provocation under Section 208 of the Penal Code. The line of inquiry as what constitutes provocation is as stated in **R v Duttys 1994 ALL ER 932** and **R v wheltfield 63 CR Appeal, R 3 gal 42**:

> **"Provocation is some act or series of acts, done (or words, spoken) by the dead man to the accused) which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused subject to passion as to make him or her for the moment not master of his mind."**

Bearing in mind the evidence by the prosecution the accused started acting violently and bullish upon the death of B and at the time held the view that her death was due to witchcraft and not any other causes. That the circumstances with such as to make the accused lost self-control to unlawfully and with malice aforethought is not captured by any sufficient evidence in his statement of defence.

I am of the considered view that prosecution does not extenuate the guilt for the offence of murder unless the accused demonstrated that he was provoked at the time by the deceased to be deprived of the power of self-control.

To retort to the heat of passion, after a critical analysis as well as the provisions of Section 206 of the Penal Code, the offence in which malice aforethought is an essential ingredient, it is clear that the accused purchased petrol from a gas station and a matchbox to lit the fire to murder the deceased.

The intention to effect the purpose underlying the provisions of Section 203 of the Penal Code basically run through the entire conduct of the accused person.

The true view of the evidence weighed in totality is doubtless as to the person who contemplated and indiscriminately committed the crime of murder against the deceased. This criminal act as stated and inferred from the prosecution case involved a series of acts and omissions by the accused at different levels that his intention was to cause death and nothing short of that suffices.

In those circumstances I venture to hold that the prosecution has discharged the burden of proof of beyond reasonable doubt for the offence of murder contrary to Section 203 as against the accused person. I too would find him guilty and as per Law established make an order for his conviction pending sentence.

Sentencing

The right to life is jealously protected in terms of Article 26 of the Constitution of Kenya, 2010. It is provided that:

> **26. Right to life**
>
> **(1) Every person has the right to life.**
>
> **(2) The life of a person begins at conception.**

(3) A person shall not be deprived of life intentionally, except to the extent authorised by this Constitution or other written law.

(4) Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law.

Initially, the offence of murder is criminalised in terms of section 203 as read with 204 of the Penal Code, Laws of Kenya. The sentence prescribed is mandatory death sentence. The said sections provide as follows:

203. Murder

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

204. Punishment of murder

Any person convicted of murder shall be sentenced to death.

However, the landmark decision in **Francis Karioko Muruatetu & Another vs. Republic, Petition No. 15 of 2015 (2019) eKLR,** brought about a paradigm shift as far as the aforementioned mandatory minimum sentences are concerned. The aforesaid case declared mandatory death penalty (cited above) and its commutation to life imprisonment by an administrative fiat, unconstitutional, null and void. This emerging jurisprudence equips the judge with some measure of discretion in determining appropriate sentences which are proportional to the individual circumstances of the case at hand.

By nullifying the death penalty, the Supreme Court seems to suggest that it is only the mandatory minimum nature which was discarded. However, in appropriate cases, death sentence remains unconstitutional and may be imposed only on a person convicted of murder committed in aggravating circumstances. By the same token the court is also equipped with discretion to vacate the death penalty in cases whose factual matrix exhibits extenuating circumstances or justifies the same.

In assessing an appropriate sentence, the court has to take into consideration the totality of mitigatory factors and sought to weigh them *vis-a-vis* the aggravatory factors at the same time seeking to strike a balance on the nature of the offence, murder with malice aforethought and the offender, his personal circumstances and societal interest, that justice must not only be done but must be seen to be done.

While the court is entitled to refer to the evidence in order to determine whether there existed aggravating circumstances or otherwise for the purpose of meting out the sentence, it is not proper for the court to set out to analyze the evidence as if it is meant to arrive at a decision on the guilt of the accused.

According to **Francis Karioko Muruatetu & Another vs. Republic, Petition No. 15 of 2015**:

"[71] To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

(a) age of the offender;

(b) being a first offender;

(c) whether the offender pleaded guilty;

(d) character and record of the offender;

(e) commission of the offence in response to gender-based violence;

(f) remorsefulness of the offender;

(g) the possibility of reform and social re-adaptation of the offender;

(h) any other factor that the Court considers relevant.

In Kenya, many courts have highlighted the principles of sentencing. One such case is the High Court criminal appeal decision in **Dahir Hussein v. Republic Criminal Appeal No. 1 of 2015; [2015] eKLR,** where the High Court held that the objectives include:

"deterrence, rehabilitation, accountability for one's actions, society protection, retribution and denouncing the conduct by the offender on the harm done to the victim."

I now proceed to marry the foregoing principles with the facts of the case. The matter brings to the force the adverse effect of this deep rooted belief in witchcraft by a myriad of communities in our nation. I must confess this belief is extremely controversial and as a court I cannot claim to have a solution to the impact of this system which dates back to the creation of mankind.

I am obliged as a court to accentuate the sanctity of human life wherever the life of an individual is snatched by the evil hand of another human being. The life that we live demand that it be respected because the tragedy is that once lost it cannot be resuscitated.

In aggravation, the taking of the deceased's life was done in the most heinous fashion. The accused persons subjected the deceased to a protracted punishment which ended with his death on the date in question. The means employed by the accused persons was undoubtedly improper in this case. The deceased was physically assaulted before his body was engulfed in fire fumes. He was burnt beyond recognition and the cause of death was ascertained to be severe burns. The accused was specifically seen drawing out petrol from his motor cycle which was used to light the fire which burnt the deceased. Having been burnt alive, the deceased died a very painful death. No human being deserves to go through such.

It is of utmost importance that cultural and religious beliefs must respect life and must be practiced in line with the Bill of Rights. I cannot overlook the fact that an innocent life was deliberately and needlessly done to death. The victim gave no provocation. He committed no wrong to the accused persons. The allegation that he was a witch was not given an opportunity to be substantiated. The accused persons usurped and derogated the duties of the traditional leaders, prosecution, judge and the executioner as well as violation the deceased fundamental right to life.

There are scattered throughout this country, local and traditional leaders whose duty is to deal with cases like the one which confronted the accused persons. The accused persons had no right to take the law into their own hands because there are not competent to handle the situation that they attempted to resolve.

The life of the deceased was not so cheap to be ended in the way it did and the accused persons were expected to contain their beliefs no matter how strong they may have been. Chaos and anarchy would enslave this country if those of the mind of the accused persons are not adequately punished for their conduct.

It must not be that easy to terminate one's life. Every one of us must learn to respect life for what it is.

Sentence

45 years imprisonment.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 22ND DAY OF JULY 2020

R. NYAKUNDI

JUDGE