REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL CASE NO. 20 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

PASCAL KAHINDI KADENGE.....ACCUSED

Coram: Hon. Justice R. Nyakundi

Ms. Sombo for State

Mr. Gekanana for Accused persons

JUDGMENT

Before this Court the accused was arraigned and charged with the offence of murder contrary to Section 203 of the Penal Code. As the particulars discloses on the 5.11.2018 at Kimbule village – Ganze Town the accused murdered **Kanze Masha**. The accused pleaded not guilty to the charge. He was represented by Learned counsel **Mr. Gekanana** whilst **Ms. Sombo**, prosecution counsel appeared for the state.

In terms of the provisions of Section 107 (1) and 108 of the Evidence Act the state summoned six witnesses to lay a basis why Judgment in its favour on conviction against the accused should be rendered by this Court.

Prosecution case

On the fateful day of the incident which resulted in the death of the deceased **(PW2) – Mramba Masha** testified as follows. That basically the deceased had been staying with them in the same homestead. It happened that on 5.11.2018 accused was asked to remove his goods and cutlery etc from the house he occupied to another premise he already constructed. According to **(PW2),** accused could not hear of it but instead started a fight with him. In turn, **(PW2),** decided to seek help from the clan elder. It is further his evidence that while on the way to the clan elder, he heard screams from the deceased to the effect that **Pascal** is killing me.

In the circumstances, he rushed back and saw the accused assaulting the deceased using a stool. That based on the assault the deceased passed on, soon thereafter on her way to Ganze hospital.

PW3 – Nyevu Kenga testified that in the course of the 5.11.2018 screams were heard from the deceased home. It was the testimony of **(PW3),** that on rushing to the scene he was confronted with the injured body of the deceased. At the scene he was shown a three legged stool used as the murder weapon to inflict the serious bodily harm. **(PW3)** promptly recorded the statement with the police.

PW4 – No. 92613 CPL Hassan, a police detective from Malindi Police Station testified that he took up the role of effecting arrest of the accused at his rented house at Ganze. He was able to positively identify the accused in the suspect box as the one reported to have committed the murder against the deceased.

PW5 – DB (minor) gave evidence that on 5.11.2018 she happened to be at home and in company of the accused, PW2, and the deceased. The witness further stated that while in that home accused suddenly directed the deceased to remove some clothes which were outside the house. Wherein it did not take long PW5 stated that she saw the accused take hold of (wooden stool) and using it to strike the deceased on the head. Thereafter, he took flight from the scene.

PW6 – Sgt Stephen Owuor in response to the investigations carried out testified that on 5.11.2018 a land cruiser arrived at Ganze Police Station and on board were members of the public and a victim of murder. The witness reiterated that the body was taken to Kilifi hospital mortuary and an invitation was made to the pathologist to conduct a post-mortem examination. On the effect of investigations he also

recorded witness statements, took possession of the recovered murder weapon being a three legged stool. In addition **(PW6)** testified that he also visited the scene to familiarize himself on the occurrence of the incident. In support of all that **(PW6)** recommended to the Director of Public prosecution for a charge of murder to be preferred against the accused.

From the evidence of **PW1 Dr. Nassir** who testified on behalf of **Dr. Baasba** on the post-mortem examination of 8.11.2018 revealed that the deceased suffered multiple deep cut wounds to the skull. As a result the cause of death was opined to be head injury.

At the close of the prosecution case, accused was placed on his defence. From his unsworn statement of defence he denied the charge. It was his testimony that during the period being referred to by the prosecution witnesses he had left for Malindi where he stayed until the first week of November 2018. In essence the accused raised an alibi defence to the circumstances surrounding the entire scenario. That is all there is in so far as the charge, evidence for the prosecution and the defence statement to the case which preceded this determination.

Analysis and Determination

The question which has to be answered is whether the prosecution presented such sufficient evidence to prove that the accused committed the unlawful act as charged with malice aforethought within the meaning of Section 203 of the Penal Code. In delving into these issues I am bound by the Judgment of the Court in **Kioko v R {1983} KLR 289, Msembe & Another v R {2003} KLR, R v Modokaa {2000} KLR 411.**

The general principle in Law is that in all criminal cases the burden of proof rests with the state and the accused has no burden to bear to proof any elements of the offence.

> ***"The approach of the Common Law to the presumption of innocence was memorably stated by Sankey L. C. in Woolmington v D.P.P {1935} A.C. 462, at 481 to be that (throughout the Wells of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoners guilt."***

The state has to discharge this burden of proof beyond reasonable doubt. It was emphasized in the comparative precedent in **R v Whyte {1988} 51 DLR** where the Canadian Supreme Court stated:

> ***"The real concern is not whether the accused must disapprove an element or prove an excue, but that an accused may be convicted while a reasonable doubt exists. When that possibility exists, there is a breach of the presumption of innocence. The exact characterization of a factor as an essential element, a collateral factor, an excuse, or a defence should not affect the analysis of the presumption of innocence. It is the final effect of provision on the verdict that is decisive. If an accused is required to prove some fact on the balance of probabilities to avoid conviction, the prosecution violates the presumption of innocence because it permits a conviction inspite of a reasonable doubt in the mind of the trier of facts as to the guilt of the accused."***

Therefore, adoption of the above reasoning it is now necessary to consider the question whether all the elements of the offence have been proved beyond reasonable doubt against the accused person.

(a). The death of the deceased

It is clear from the evidence adduced by **PW1, PW2, PW3, PW4, PW5 and PW6** that the deceased **Kanze Masha** is dead. The excerpts from the post-mortem examination is in support of the contention that the deceased suffered multiple injuries to the head and immediately thereafter that became to be confirmed as the cause of death.

(b). The other statutory anchorage for the offence of murder is the element of unlawful act or omission

The evidence expected of the state raising the degree of beyond reasonable doubt is as to the voluntary character of the physical act involved in the commission of the crime without excuse or justification. The deceased was alive on the 5.11.2018 before hell broke loose and the accused armed himself with a three legged stool and did attack her on the head certainly inflicting fatal bodily harm. In this case, (PW2) and (PW5) presented direct evidence to the effect that without prior provocation accused person brought about the death of the deceased by hitting her severally on the head. The extent of their evidence is such that they were able to give evidence about the accused sobriety immediately before and during the infliction of harm. During this brief encounter PW2 and PW5 observed that upon accused realizing the gravity of injuries inflicted he took flight out of the scene.

According to **Dr. Nassir** the weapon used caused a deep penetrating injury to the head. The application of such injury according to **Dr. Nassir** required violent and heavy force to occasion fatal injury to this vulnerable aspect of the human body. These facts drawn from the post-mortem examination culminated into a single conclusion, that the head injury caused the death of the deceased.

The accused denied these allegations by PW2 and PW5 that at the relevant time and date he was at the scene and by using a wooden stool did assault the deceased fatally. Except for disputing the incident and the manner in or occurred. Its inevitable for me to infer that the deceased death was unlawfully caused. To this end the evidence by the prosecution witnesses is water tight and substantially overwhelming to remove any doubt as to the nature of the dangerous act which threatened and violated the right of the deceased to continue enjoying the right to life.

c. The third element is that of the death of the deceased occurred by an accused person who had malice aforethought

In the dichotomy of this element Section (206) of the Penal Code provides various circumstances in which malice aforethought can be stated to be manifested in a particular case. It is a general rule of our Criminal Law that malice aforethought must be proved by the state beyond

reasonable doubt. That the accused in causing death through the unlawful act intended to cause death or to do grievous harm to the deceased or he had the knowledge that his unlawful act or omission would probably cause death of the deceased even if the person so killed need not necessarily have been the person the deceased intended to kill**. (See the principles in R v Ndalamia & 2 others {2003} KLR, Rex v Petro Mangongo s/o Kalwa Otenja v R {1973} EA 546).** The requisite intention for murder could be formed before, during or at the spur of the moment to do an unlawful act which endangers right to life as contemplated under Article 26 of the Constitution. Thus, under Section 206 the perspective elements of malice aforethought in unequivocal terms may arise on any one of the following circumstances, nature of the weapon used, the manner in which it was used, the absolute violent force applied, targeted vulnerable parts of the body of the victim and the relative conduct of the accused during or after the entirety of the voluntary act. **(See Tubere s/o Ochen {1945} 12 EACA 63, Ogeto v Republic 2 KLR (14), Ernest Asami Bwire Abanga alias Onyango v R CACRA NO 32 of 1990).** The view espoused by these authorities and others, reflected in some of the decisions of the our Courts is an inquiry into the subjective state of mind of an accused at the time he or she committed the offence. Intention therefore is concerned with what the accused intended and what he or she reasonably foresaw when directing the unlawful act against the deceased.

In the persuasive case of **S v Sigwalla {1967} 4 SA 566**, the Court said:

> ***"the expression intention to kill does not, in Law necessary 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 dolus eventuals as distinct from dolus directus."***

It is helpful at this stage to recall the evidence set out by the prosecution to conceptualize whether the accused conduct was actuated with malice aforethought. In a case as this one, according to PW2 and PW5 the accused armed himself with a wooden stool and with it the deceased was under attack. Note also that the accused was not under any imminent danger to use force to bring about the result of death or grievous harm. Up to this point one can clearly see from the evidence stated by (PW2) and (PW5) the conduct of the accused in committing the offence satisfies the definitional elements contrary to Section 203 of the Penal Code. The so called doctrine of malice aforethought constituted as part of the scheme in which the accused executed the unlawful act that killed the deceased. **(PW1) Dr. Nassir** observed that the deceased died as a consequence of multiple deep wounds to the head. I am therefore at pains not to rule out malice aforethought on account of the overall circumstances in which the offence was committed.

With regard to identification evidence of the accused, I am guided by the principles in **Abdalla Bin Wendo {1953} EACA 166 and Ruria v R {1967} EA 583.**

In the instant case, the circumstances alluded to by PW2 and PW5 were such that they were familiar with the accused. There was also adequate and sufficient light to aid visual identification together with proximity of the witnesses and the accused person on the material day. Thus the evidence is made stronger on the fact that the criminal transactions by the accused took place in broad daylight, to be precise at 9.00 a.m. in the morning.

Surely, simply from the available evidence led by PW2 and PW5 the test of consistency as carefully explained in **Abdalla Wendo & Roria (supra)** created no gaps for me to allege that accused person was not at the scene of the murder. I have found no possibility of mistaken identification to warrant this Court exonerate the accused from being at the scene.

In addition to the above, its evident that the prosecution brought this case within the context of Section 33 of the Evidence Act on applicability of admissibility of a dying declarations. The Courts have led considerations on admissibility of dying declarations to be of a solemn and awful nature with no motivation to falsehood but to speak the truth by the declarant who is at the point of death and when all hope of survival is all gone Courts have often emphasized the admissibility of a dying declarations as evidence of necessity which clearly satisfies the following criterion. One of the foremost authority on this Section is the case of **Choge v R {1985} KLR**:

> ***"The general principle on which a dying declaration is admitted in evidence, is that, in a declaration made in extremity when the maker is at the point of death and the mind induced by the most powerful considerations to tell the truth."*****(See also Philip Nzaka Watu v R {2016} eKLR)**

Similarly **Wigmore on Criminal cases of homicide 1969 N.E 2nd Edition** said as follows:

> ***"Besides the usual evidence of guilt in general cases of felony ….. There is one kind of evidence, more peculiar to the case of homicide, which is the declarations of the deceased after the mortal blow, as to the fact itself, and the party by whom it was committed. Evidence of this sort is admissible in this case on the fullest necessity, for it often happens that there is no third person present to be an eye witness to the fact; and the usual witness on occasion of other felonies, namely the party injured himself is gotten rid of."***

The rule that the declarant must believe that death is impending or that he or she cannot recover is the one requisite almost universally accepted indicator by the Courts in otherwise admitting or excluding the statement as evidence against an accused person.

Following this same line of reasoning, in (PW2) testimony, he heard the deceased name the accused as the one who was inflicting the fatal injuries. All of this is held to be relevant material and competent part of proof by the prosecution to connect the accused with the alleged death of the deceased.

In my Judgment notwithstanding anything else after taking into consideration the surrounding circumstances of the murder. I am persuaded that the deceased dying declaration is admissible.

Before I pen of I am mindful to make a commentary on the alibi defence raised by the accused. In Law an alibi means that the accused was

elsewhere at the time of the commission of the offence true to his statement of defence, accused contended that he spent that particular day in Malindi.

In the case of **Ogogovie v State {2016} SC Sanusi JSC** stated that the word alibi:

> ***"Simply means elsewhere it is the duty of the accused who intends to rely on it as a defence, to furnish the police with sufficient particulars of the same. He must state his whereabouts and those persons with him at the material time. It is then, that it is left for the prosecution to disapprove same as failure to investigate the alibi may lead to the acquittal of the accused."***

Further in ***Patrick Njokens & ors (NWLR {2001} 668*** the Court stated:

> ***"there is nothing extra ordinary or esoteric in plea of alibi such a plea postulates that the accused person could not have been at the scene of the crime and only inferentially that he was not there. Even if it is the duty of the prosecution to check on a statement of alibi by an accused person, and disapprove the alibi or attempts to do so; there is no inflexible and or invariable way of doing this if the prosecution adduces sufficient and accepted evidence of crime at the material time. Surely his alibi is thereby logically and physically demolished."***

In my view matters put together the prosecution said that the accused committed the offence on 5.11.2018, whereas in his unsworn testimony he was in Malindi.

According to PW2 and PW5 the whole incident happened at Kimbule village. This was during the day. There is no way accused person could be at Kimbule and at the same time in Malindi. The best scenario that there is accused claim can only be effectuated after the fact of the offence being committed. There are no inconsistencies and contradictions with regard to eye-witnesses to the offence who placed the accused in the vicinity of the crime and the assertion made in the alibi defence.

It suffices therefore to say that the prosecution did prove the offence of murder contrary to Section 203 of the Penal Code beyond reasonable doubt. I do not agree with the alibi defence of the accused person. There is ample evidence to find him guilty and with that convict him of the offence accordingly.

Sentence

In this case, **Pascal Kahindi Kadenge** you have been found guilty for the offence of murder contrary to Section 203 of the Penal Code. I will now endeavor to sentence you for the offence as provided for under Section 204 of the Penal Code. As confirmed from the Judgment your intention on 5.11.2018 was to kill the deceased **Kanze Masha**. You claim through your advocate **Mr. Gekanana** to be aged 59 years old, married and supporting the children of your brother, I note that you regret the offence and on that basis you seek for mercy from this Court to consider a lesser sentence other than the death penalty.

I am also satisfied that in this case you have been in remand custody since 19.11.2018. This is because under the sentencing guidelines that period in remand under Section 333 (2) of the Criminal Procedure Code. Should in the context of the sentence be considered a set off. As regards to aggravating factors the following characteristics have been identified, the degree of planning demonstrates that, this was willful murder to the extent that the deceased suffered multiple grave injuries to the head. Further, the particular vulnerability of the deceased to the extent that her death was without any excuse or provocation. Section 204 of the Penal Code permits the Court to pass a discretionary sentence with the maximum being the death penalty.

The offence in question following the dictum in **Francis Muruatetu {2017}** you are liable to be sentenced to death or any other sentence that is significant and address the key parameters to meet the justice of the case.

The consider ration is that the nature of the offence and its gravity calls for a deterrent sentence. There is no doubt as regards the offence I consider you a serious, dangerous and devious individual. Weighing all factors one after another long record of incarceration is the only sentence which would provide some level of satisfaction to the victim family and public protection in this heinous crime.

In my Judgment whether one looks at aggravating and mitigation factors together, the appropriate term of imprisonment I permit is that of thirty (30) years imprisonment with effect from 19.11.2018 to give effect to the discount for the period in remand custody.

14 days right of appeal explained.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 5TH DAY OF AUGUST 2020

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R. NYAKUNDI

JUDGE