



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL CASE NO. 15 OF 2017

REPUBLIC.....PROSECUTION

VERSUS

1. JUMA MWARABU CHAI alias JUMA KAZUNGU...1ST ACCUSED

2. RAPHAEL MAITHA KAZUNGU.....2ND ACCUSED

Coram: Hon. Justice R. Nyakundi

Ms. Sombo for the state

Mr. Obaga for the accused persons

JUDGMENT

The accused persons **Juma Mwarabu Chai alias Juma Kazungu** and **Raphael Maitha Kazungu** with another set free at a no motion of a case to answer face the charge of murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars as framed by the state are that on 15.8.2017 at Kibaoni village, within Kilifi County, jointly with others not before Court unlawfully murdered Nyambu Shoka. Each of the accused pleaded not guilty. In their trial pursuant to Article 50 (11) of the Constitution **Mr. Obaga** was appointed legal counsel to conduct the defence whereas **Ms. Sombo** represented the state.

Outline of the case for the prosecution

The first witness for the prosecution happened to be **Bahati Mbitsi Nyamu (PW1)**, a brother to the deceased and an uncle to the accused persons. He went on to testify that on 15.8.2017 while in the forest cutting trees he was informed that the deceased was in need of talking to him. Thereafter, he left for the house of the deceased where they discussed about the impending purchase price of the land they had sold to **Mwaringa**.

(PW1), a brother to the deceased and an uncle to the accused persons. He went on to testify that on 15.8.2017 while in the forest cutting trees he was informed that the deceased was in need of talking to him. Thereafter, he left for the house of the deceased where they discussed about the impending purchase price of the land they had sold to **Mwaringa**. **(PW1)**, further testified for that reason they rode a motor cycle to meet the said **Mwaringa**. In the course the motorcycle ran out of fuel leaving the deceased and **Mwaringa** at a club belonging to his sister on his return **(PW1)** found a conversation going on in regard to a sick child stated to have been bewitched by the deceased. This incident of the child being bewitched got the attention of family members who included the accused persons. As the discussion went by the deceased was attacked sustaining injuries to the head. The witness saw an attack upon the deceased from the accused persons and others not before Court.

According to **(PW1)** testimony the attack was violent and furious as no amount of flight from the scene deterred the accused persons from assaulting the deceased. It is from those injuries inflicted the deceased succumbed to death. **(PW2) – Mache Mwaninga** in his testimony told the Court that he learnt about the death of the deceased from the family members. **(PW3) – Dr. Ndolo** adduced evidence on behalf of **Dr. Mansur** who had earlier conducted a post-mortem examination upon the body of the deceased.

In the post-mortem admitted as exhibit 1, **Dr. Ndolo** told the Court that the deceased suffered fracture injuries to both the right and left temporal side of the head and bruises to the back. **(PW3)** informed the Court that the cause of death was hemorrhage secondary to head injury.

(PW4) PC Leonard Muthuri, gave evidence on behalf of the police detective who investigated the crime of murder against the deceased. At the close of the prosecution case each of the accused was placed on his defence pursuant to Section 306 (2) of the Criminal Procedure Code. The **1st accused – Juma Mwarabu Chai** denied the offence and raised an alibi defence. The accused statement on account stated

that he was at Minarani and not at the scene of the murder.

As for the second accused – **Raphael Kazungu**, he too denied any knowledge or any participation to kill the deceased. He also maintained that it was after his sudden arrest he came to know of the allegations.

Determination

The accused persons having been charged with the offence of murder contrary to Section 203 of the Penal Code required of the prosecution to prove the charge beyond reasonable doubt to secure a conviction. It is trite that under Section 203 of the Penal Code the burden of proof vested in the prosecution is to prove the following elements:

- (a). The death of the deceased.*
- (b). That the death of the deceased was unlawfully caused.*
- (c). That in causing the death of the deceased the perpetrators had malice aforethought.*
- (d). That in all the accused persons before Court caused the death of the deceased.*

It is clear from the evidence of **(PW1)**, **(PW2)**, **(PW3)** and **(PW4)** there is no dispute that the deceased who had been with the accused person was attacked to death. **(PW3)** gave medical evidence on behalf of **Dr. Mansour** who performed the post-mortem that the deceased died out of the severe injuries inflicted to the head. The evidence by the prosecution has satisfied the criteria set out in **Cheya & another {1973} E. A. 300, Benson Ngunyi v R CACRA NO. 171 of 1984**. I therefore, find that the death of the deceased has been proved beyond reasonable doubt.

(b).As regards the charge of murder, it connotes intentional unlawful killing of another human being without any excuse or justification. It is said that the unlawful conduct of the accused and culpability arise out of steps taken to put the life of the deceased in danger by inflicting harm which causes death or grievous harm. To accede to the facts of the present case on the contention of intentional unlawful killing **(PW2)** told the Court that the accused persons hit the deceased on the head with the blunt side of the clubs and other manipulated dangerous weapons. From the testimony of **(PW2)** the accused persons pursued the deceased in circumstances that demonstrate prima facie unlawful acts of omission. In this case the accused assaulted the deceased in the presence of several other people who did not intervene. So instead of the accused taking positive steps to save the life of deceased but what they did ultimately strapped in a series of injuries that fatally killed the deceased. It deserves attention that the prosecution has discharged the required standard of proof beyond reasonable doubt and no defence was offered to contradict that essential element of the death of the deceased being unlawful.

(c). Thirdly, also the question focused on the liability of the accused persons is the element on malice aforethought. The clearest exposition on this element can be found in the definition under Section 206 of the Penal Code in which malice aforethought is stated to mean:

- (i). An intention to cause death of any person whether such person is the one actually killed or not or an intention to cause grievous harm to another.*
- (ii). Knowledge that the act or omission causing death will probably cause death of some person.*
- (iii). Whether such person is the person actually killed or not, although such knowledge is accompanied by indifference by a wish that it may not be caused.*

(See **Samwel Mosirigwa Mandere v R CACRA No. 59 of 1997, Ogeto v R {2004} 2 KLR 14, Rex v Mazabia Bin Mkomi {1941} & EACA 85**). It would seem the best case for recognition of the intention and or malice aforethought would be the context given in **R v Tubere s/o Ochen {1945} 12 EACA 63**. The focus is by definition the prospect and use of the weapons in the unlawful acts and conduct of the accused, the nature of the injuries and the vulnerable parts of the body targeted and consequential loss arising out of the attack, the accused persons conduct justifying the unlawful act, i.e. the resort to use excessive and unreasonable force and the failure for an accused to act in the face of a legal duty to act to preserve the right to life under Article 26 of the Constitution. There is of course no universally accepted definition of malice aforethought. The approach may fit neatly with the guidelines in Tubere case but more important its for the prosecution to adduce evidence to prove existence of that element.

On the basis of this definition, the deceased was attacked and assaulted several times occasioning fractures to the head. according to the pathologist **(PW3)** the deceased died as a result of hemorrhage due to severe head injury the relevance of the facts of this case on culpable homicide flows from the nature of the weapons used, the vulnerable part of the body targeted by the attackers and the accused harboring intention to cause death or to do grievous harm to the deceased. I pause the question, did the accused persons foresee the risk of their prohibited action would cause the deceased death but proceeded to take the risk.

In the persuasive case in **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.”

I am therefore of the conceded view that the prosecution has proved malice aforethought of the accused persons' intention to kill the

deceased. Finally, as clear from the review of authorities and guidelines laid down in **R v Turnbull {1976} 3 ALL ER 549, Gopa s/o Gioameeanya v R {1953} 20 EACA 318** I have closely undertaken a closer examination of the evidence by **(PW2)** with greatest care as required of this Court in **Turnbull case (supra)**. The chain of evidence from that of **(PW1)** to the sole identifying witness of **(PW2)** both do support positive identification of the accused persons. There was no material discrepancy about the recognition of the accused at the scene and their involvement in committing the offence. The inference to be drawn from the prosecution case balanced with the defence establishes favourable circumstances prevailing for **(PW2)** to visually recognize the accused. I should also note and acknowledge that **(PW2)** and the accused persons are well versed with each other prior to this incident in which the deceased was murdered.

It is a case of the evidence by **(PW2)** against that of the accused. The test is whether there exist any shred of evidence to cast a doubt that the witness may be honest but mistaken.

In my view the crux of this matter is based on the constituency and strength of the evidence adduced by **(PW2)**. Thus on observation the sufficiency of evidence taken at its highest resulted in placing the accused persons at the scene to the extent that the alibi defence failed to contrast that piece of evidence. In this case testing with the greatest care the evidence of **(PW2)** and in view of the favourable circumstances of the incident which happened in daytime, there is no evidence to impeach **(PW2's)** credibility and truthfulness as to identification. The effect of this is that the accused persons purported alibi defence collapses and the prima facie evidence in support of the prosecution carries the day to secure a conviction for the offence of murder contrary to Section 203 of the Penal Code.

Accordingly, I find the accused persons guilty of the offence as charged in which I exercise jurisdiction consequentially to convict against the weight of evidence.

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

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R. NYAKUNDI

JUDGE

In the presence of: