



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CRIMINAL CASE NO. 3 OF 2016**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**1. MBOGO KATANA TINYA... 1<sup>ST</sup> ACCUSED**

**2. MATESO CHARO TINYA....2<sup>ND</sup> ACCUSED**

**CORAM: Hon. Justice R. Nyakundi**

**Ms. Sombo for the state**

**Mr. Ogeto for the accused persons**

**JUDGMENT**

The accused persons **Mbogo Katana Tinya** and **Mateso Charo Tinya** were jointly charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code Chapter 63 of the Laws of Kenya. The brief particulars in the information by the state was to the effect that on the 16.9.2014, at Tsanzuni Village, Palakumi Location in Ganze District, jointly with others not before court murdered **Sammy Kasiwa Karisa**.

The accused persons on being arraigned before court pleaded not guilty and in their defence they were represented by Learned Counsel **Mr. Ogeto** while the prosecution was led by **Ms. Sombo**. Generally, the accused persons are entitled to right of presumption of innocence until the contrary is proved under Article 50 (2) (a) of the constitution. That burden rests with the prosecution to prove the charge beyond reasonable doubt. To discharge both the legal and evidential burden the prosecution summoned evidence of six witnesses.

**Summary of the prosecution's case**

**PW1 – Amina Sammy** told the court that on 16.9.2014 after arriving home from school, the accused persons and others not before court armed with pangas and clubs, attacked her the deceased with a three legged stool. He was able to identify the murder weapon as an exhibit which successfully was used to inflict harm upon the deceased head. PW1 testimony was followed closely with that of **PW2 – Sadiki Sammy** also a brother of his who arrived home the same time with (PW1). **PW2** told the court that it did not take long before he could notice the presence of the two accused persons and three others not before court armed with pangas and clubs going after his father inside the house. PW2 pointed out that no sooner than later the accused picked a stool pursued the deceased and inflicted harm from which he succumbed to death.

**PW3 – Eunice Jumwa**, the widow to the deceased testified and stated towards the end of the day on 16.9.2014, together with the deceased they were within their homestead. At the same stage she saw the 1<sup>st</sup> accused and 2<sup>nd</sup> accused with three other men approach the house directly to where the deceased was seated under a shade. She testified that as the accused were armed with pangas and sticks. They immediately started attacking the deceased and soon thereafter picked the stool he was sitting on to inflict further harm to the head.

She further said that the assault prompted her to scream in order to call for help from the neighbours as the suspects exited the scene.

**PW4 – Gladys Kabove** witness statement on oath also implicated the accused persons to the effect that on 16.9.2014 having responded to the screams by PW3 she saw accused one holding a panga and stool which he used to inflict harm upon the deceased. Further, PW4 explained that the second accused, using his panga assaulted the deceased before they could run away with the other three not charged in court.

**PW5 – Garama Tinya** from his evidence told the court that on the day the deceased was violently hit, he was informed of the incident by one **Charles Kalei**. It is clear from PW5 testimony that on arrival at the home of the deceased it would be seen he succumbed to death out of the injuries inflicted by the assailants. He was just shown the stool allegedly used as one of the weapons to inflict fatal harm against the deceased.

**PW6** – In evidence following the statement he made to the police **Snr. Sgt Francis Rono** told the court that steps were taken to visit the scene, record witness statements from eye witnesses, collect the body from the scene to Kilifi Hospital mortuary for purposes of post mortem. In the course of the investigations PW6, was shown a stool as part of the weapons used to cause injuries upon the deceased. He also drew the sketch plan to document the scene both of which he produced in court as exhibits. PW6 also identified the post mortem report which opined the cause of death of the deceased.

After the close of the prosecution case, accused persons were placed on their defence. The 1<sup>st</sup> accused **Mbogo Katana**, in unsworn statement of defence denied that he was one of the people involved in the murder of the deceased. Another part of the evidence he alluded to was the circumstances in which the deceased died and the response by members of the neighborhood. His version was to the effect that after the death of the deceased he stayed for one and half years before the police could effect an arrest.

The second accused evidence in court was in the context of his testimony that he did not commit the act of killing as pointed out by the prosecution witnesses. Further the accused stated that all that happened while he was working at his charcoal burning business was the voice of distress screams regarding the death of the deceased. He denied any knowledge or participation in assaulting the deceased. All these forms the basis of the defence narration.

### **Analysis and Determination**

The onus of proof under Section 107 (1) and 108 of the Evidence act and as further restated by the court in **Woolmington v DPP {1935} AC** and **Miller v Minister of Pensions {1942} 2 ALL ER** rests squarely on the prosecution to prove the essential of the elements of murder contrary to Section 203 beyond reasonable doubt. Further, the facts of the case ascribe to the doctrine of common intention under Section 21 of the Penal Code. That means evidence ought to show that the two accused persons had a common intention to actively prosecute the murder of the deceased. It is trite that under common intention, the prosecution does not need to prove that each of the perpetrator did the actual act of the killing.

To drive the point home, it's incumbent to give the following illustration as what is expected of the prosecution to prove against the accused persons as charged. The essential elements capable of securing a conviction involve the following:

- (a). The death of the deceased.**
- (b). That the death of the deceased was unlawfully caused.**
- (c). That the perpetrators to the crime in causing death had malice aforethought.**
- (d). That for all intents and purposes the accused persons were positively identified and placed at the scene.**

I shall then proceed to align each ingredient of the offence with evidence tendered by the prosecution to ascertain whether that standard of proof has been discharged beyond reasonable doubt.

#### **1. Death of the deceased**

The offence of murder as defined under Section 203 of the Penal Code is predicated on there being existence of death of another human being through unlawful means or acts of omission. As a general principle some of the unlawful acts of omission which are attributable for one to be held responsible for the death of another human being are as defined in Section 213 of the Penal Code.

Therefore, one is deemed to have caused the death if evidence establishes the proximate cause as the act which one can be held responsible although his act may not be the immediate or sole cause of the death of the deceased. There is no dispute from the testimonies of PW1, PW2, PW3, PW4 PW5 and PW6 that the deceased was assaulted on 16.9.2014 at his house. The post mortem examination report admitted in court by consent from Kilifi Hospital mortuary proved the death of the deceased in terms of the principles in the case of **Benson Ngunyi Nundu v R CACRA NO. 171 OF 1984**. In the opinion of the pathologist the deceased suffered deep cut extending to the occipital to the left ear and cervical vertebrae. His body was positively identified to the pathologist by **Charles Kato** and **Rehema Jenifer Kasiwa**.

The accused persons in their defence did not dispute the death of the deceased. It goes, therefore without saying that the prosecution has discharged the burden of proof that the deceased is dead.

#### **2. The unlawful act of omission**

This element is what is commonly referred to as the *actus reus* of the offence comprising of the act or omission and the result or consequences of the said unlawful act in terms of Article 26 (3) of the constitution.

**“A person shall not be deprived of life intentionally except to the extent authorized by this constitution or other written Law. It is a firm rule that death is only excusable if the circumstances are that an accused can successfully raise the defence of self, property or of a third party. In cases of defence of insanity taking into account the facts and evidence to sufficiently**

**establish that the death occurred within the legal parameters provided in the Law on these well-known defences.”**

The main issue which I have to determine is whether the principle laid down in the case of **R v Gusambizi S/o Wesonga {1948} 15 EACA 65** can apply to the facts of the instant charge of murder against the accused persons.

It is to be noted from PW1, PW2, PW3 and PW4 evidence the deceased was within his homestead on 16.9.2014 at about 6.00 p.m. However, for unknown reasons the accused persons with others not before court violently entered the compound armed with pangas and clubs all targeted at the deceased.

**PW1 – Amina Sammy his daughter, Saida Sammy** his son and **PW3 Eunice Jumwa Sammy**, the widow, happened to be within close proximity to where the deceased was hacked with pangas and finally a stool which he used as a seat outside the house. Shortly, thereafter **PW4 Sidi Kasiwa Karisa**, the mother to the deceased who also rushed to the scene upon hearing screams confirmed that on arrival the assailants were yet to leave the compound. The four witnesses explained that the deceased was cut on the forehead, back, shoulder and occipital region, in a manner which fatally occasioned his death instantly.

According to PW6 the investigating officer based at Bamba Police Station received a phone that the deceased person had been murdered. PW6 stated that he arrived at the scene and took charge of the scene making arrangements for the body to be taken to Kilifi Hospital Mortuary. After a brief inquiry witness statements were recorded from PW1 – PW5 which formed the foundational evidence against the accused persons. At the scene he drew a sketch plan and also recovered the stool identified by the witnesses PW1, PW2 and PW3 as one of the weapons used to inflict harm upon the deceased.

The pathologist from Kilifi Hospital Mortuary opined on 18.9.2014 that the deceased body visible injuries in which he observed that the deceased died out of excessive bleeding from major vessels and a possible cervical vertebrae fracture. The gist of the evidence by the prosecution establishes that the death of the deceased was unlawfully caused.

### **3. Malice aforethought**

When accused person is alleged to have killed the deceased with malice aforethought pursuant to Section 203 of the Penal Code the following circumstances as defined in Section 206 of the Penal Code ought to be proved beyond reasonable doubt.

**(a). 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 the deceased.**

**(b). Or where knowledge that the act or omission causing death with probably cause death or grievous harm to some person, whether that person is the person killed or not, accompanied by indifference whether death or grievous injury occurs or not or by a ..... that it may not be caused.**

**(c). An intent to commit a felony**

**(d). An intention to facilitate the escape from custody of or the flight of any person who has committed a felony or attempted it.**

It is incumbent upon the prosecution to adduce evidence to prove that the accused persons jointly intended to cause the death or to do grievous bodily harm or that they had knowledge that their acts would probably cause the death of the deceased. In the case of **R v Tubere S/o Ochen {1945} 12 EACA 63** It is important that the court establishes the intention to prosecute an unlawful purpose from the set of facts by considering the weapon used, the manner in which it was used the part of the body targeted and the gravity of injuries and the conduct of the accused persons prior, during or after committing the crime.

The issue of the seriousness of the injuries and parts of the body targeted falls prima facie in the category of a murder committed with malice aforethought. See **(Ernest Aswani Bwire Abanga alias Onyango v R CACRA NO. 32 OF 1990, Morris Aluoch v R Nakuru CA CRA NO. 47 OF 1996, Kanani & three others v R {1991} KAR 622).**

In the above cases the Court of Appeal held that:

**“The evidence adduced showed that the deceased victim of the offence died as a result of serious injuries inflicted on serious parts of their bodies which resulted in their death.”**

This intention and knowledge of the accused that they prosecuted the murder with such brutality stipulated the unlawful act to be brought within Section 206 (a) (b) and (c) of the Penal Code on malice aforethought.

In **Olenja v R {1973} EA 546** the court held that:

**“Malice aforethought was deemed to be proved in view of the fact that the accused persons used violence in committing a felony of involving personal violence he is guilty of murder even it may be said to be caused inadvertently.”**

In this case the evidence by the prosecution starting with PW1, PW2 and PW3 indicates that the accused persons entered the compound armed with pangas and clubs. It is clear from their conduct that the intention was to cause death or to do grievous harm. Simply, because

without any provocation, violence flared up targeting the deceased. The state of affairs created by the accused was that of inflicting fatal injuries using pangas, clubs and finally the stool which was being used by the deceased, manifest malice aforethought.

The evidence set out by PW1, PW2, PW3 and corroborated with that of PW4 indicate a malicious intent conclusive of the existence of an intention to murder the deceased. It is also evident from the post mortem, that the major stab wounds to the head, back, shoulder, occiput of the body are consistent with the evidence on oath of PW1, PW2 and PW3 that accused persons conduct before, during and after the criminal act postulates malice aforethought.

At that juncture it is instructive to note that the accused persons only left the scene upon confirming that the deceased must have taken his last breath.

As reiterated elsewhere in this Judgment there was evidence from PW1, PW2, PW3 and PW4 that the 1<sup>st</sup> and 2<sup>nd</sup> accused happened to be in company of other men when they sought out to assault the deceased with pangas, clubs and a stool. The common intention under Section 20 of the Penal Code envisages people with similar intention harbored by the accused persons who armed themselves with dangerous weapons to actually participate in the killing of the deceased. The manner in which they entered the compound of the deceased and straight going for violent attack against the deceased are all matters of common intention. When the charge and the evidence is read together the court in **R v Jogee 2016 UK SC 8 (WLR (D) 84**, the Supreme Court held that:

**“The requisite conduct element was that the accessory had assisted or encouraged the commission of the offence by the principal the mental element was an intention to assist or encourage the commission of that crime. Foresight, that the principal might commit the offence charged was not be equated with intent to assist. The correct approach was to treat foresight as evidence, for the jury to consider of the intent to assist and encourage the mental element required for accessory liability is an intention to assist and encourage the principal to commit the offence charged.”**

In their defence, the accused persons stated that they were not part of the perpetrators inspite of their arrest by the police. Nevertheless, for this court the evidence by the prosecution remains watertight and overwhelming that these two accused persons inflicted the fatal injuries suffered by the deceased. For these reasons malice aforethought has been proved beyond reasonable doubt.

Before leaving the analysis I would venture to say something on identification of the accused persons. In **Kariuki Njiru & 7 Others v R CR Appeal No. 6 of 2001** the Court of Appeal stated as follows:

**“The Law on identification is well settled and this court has from time to time, said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error” (See also Wamunga v R {1989} KLR 424 )**

In the circumstances of this case (PW1), (PW2) and (PW3) gave a description of the accused persons including positively making reference to their names. These crucial evidence is consistent with the dicta in the case of **Simiyu & Another v R {2005} IKLR 192** wherein, the court held:

**“In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by a person or persons who gave the description and purport to identify the accused and then by the person or persons to whom the description was given.”**

Turning to the testimonies of (PW1), (PW2), (PW3) and (PW4) it was evident of witnesses who knew the accused persons. Infact, the threat to actual violence happened at 6.00 p.m. and fairly at that time circumstances are such that positive recognition of the accused would satisfactorily take place without any error or mistake.

When I test the evidence led by the prosecution on identification there are no gaps in the description given by (PW1), (PW2), (PW3) and (PW4) that would class their testimony as inaccurate or unreliable in positively recognizing the accused persons and placing them at the scene of the murder. In my view the prosecution has discharged the burden of proof of beyond reasonable doubt that the accused jointly with a common intention, unlawfully and with malice aforethought killed the deceased contrary to Section 203 of the Penal Code.

For the foregoing reasons, I find each one of them guilty and do convict them as per the Law established.

## **Sentence**

The question for this Court is what would be the appropriate sentence for the offence? I have weighed both the aggravating factors and balancing them with the mitigation offered by the convicts. All in all, I am persuaded that the aggravating with regard to the gravity of the offence, the consensus upon which the deceased was killed is predicated on a plan, to execute the heinous crime.

I am therefore of the considered view that under the guidelines on sentencing laid down in **Francis Muruatetu v R {2017} eKLR** each of the accused is sentenced to a ten or imprisonment of 30 years.

14 days right of appeal explained.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 16<sup>TH</sup> DAY OF DECEMBER 2020**

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**R. NYAKUNDI**

**JUDGE**

**In the presence of:**

1. Mr. Sirma holding brief for Mr. Alenga
2. The accused persons