



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL CASE NO. 23 OF 2015

REPUBLIC.....PROSECUTION

VERSUS

1. HARRISON DOUGLAS OCHIENG

2. ANIFA NZAKA VURA

3. JAPHET KITUNDU MONGELA.....ACCUSED PERSONS

RULING

1. The accused persons, HARRISON DOUGLAS OCHIENG, ANIFA NZAKA VURA & JAPHETH KITUNDU MONGELA are charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars are that;

“On the 24th day of May, 2015 at Kasarani area in Mtwapa Township within Kilifi County in the Republic of Kenya, the accused persons jointly murdered THOMAS MBEIYA NAMASYA alias WAIYAKI.”

2. The accused persons were first arraigned in court on 5th June, 2015 and on 24th June, 2015 they entered a plea of NOT GUILTY to the said charge. The hearing of their trial commenced on 4th November, 2015 whereby the prosecution called eight (8) witnesses in support of their case.

3. The brief facts of the prosecution’s case were that on 23rd May, 2015, PW3, LAWRENCE KIPLANG’AT CHESIRE, LAWI HARRISON, the 1st accused, ANIFA, the 2nd accused person, NATASHA and many other people were having palm wine drink at “kwa mama nyanya (herein referred to as PW5) at Kasarani area in Mtwapa.

4. The deceased, Waiyaki came there too and asked for a drink. He was given ½ a glass of palm wine by the owner, PW5. These people had their drink and kept leaving the place at their own pleasure.

5. And after 6:00pm, the 2nd accused and grandchild to PW1 wanted to leave and join Lawi for a drink elsewhere when the 1st accused person called and told them that he wanted to buy them a drink. He infact bought a small bottle of napoleon and they went to mama nyanya’s place.

6. When they got there, they found the place closed. They then went to Kilonzo’s joint where they found Kilonzo and Kilundi (the 3rd accused person). They sat on a veranda and had their drink which they mixed with palm wine from Kilonzo’s joint. That Kilonzo denied his joint at 9:00pm and the three accused persons and another were left behind.

7. It was evidenced that the deceased, appeared from the kitchen and other joints behind mama nyanya’s place and sat at a short distance from there but did not talk and neither was he having a drink.

8. It was the evidence of Awino Onjiko Bonyo aka Mama Nyanya (PW5 herein) that he received a phone call at about 2:00pm on 24th May, 2015 from a person she did not identify informing her that her kiosk had been broken into. She could not go to the kiosk at that time because of the distance to her home and she told the caller so. She went there at 6:00am and found the door broken and there was a body of a man lying dead in there. She neither entered the kiosk and looked at the body to see who it was. She went and reported the matter at Mtwapa police station and the police accompanied her back to her kiosk, where she established the 20 bottles of palm wine what she had left in the kiosk had been stolen and the dead man was Waiyaki.

9. PW8, PC Denis Nyakina of CID Kilifi told court that he, on instructions of the DCIO, CIP Semata, accompanied Corporal Chege, PC Oyalo and P.C Driver Nderitu to Kasarani area in Mtwapa where a person had reportedly been killed. They found the OCS, Mtwapa and his officers collecting the body from the scene and they went to the station to record statement from witnesses. He said that he also received broken bottles, and a hand bag which had been collected from the scene as exhibits.

10. PW8 told court that according to his investigations the deceased was seen around the palm wine (mnazi) drinking dens on the evening of 23rd May, 2015 where there were several people and the last ones to be seen there were Sophie Akinyi, Harrison, Anifa and Japheth Kitundu but Sophie had left earlier than the other three.

11. All these people were arrested and held as suspects but later Sophie was released and treated as a witness. PW8 produced the broken bottle, the black handbag, one stone, a lesso and a safaricom as exhibits P1, 2, 3 & 4 and a statement that was recorded by CIP Philemon under inquiry as exhibit P5.

12. There was a confession statement which was allegedly recorded from Anifa the 2nd accused person by PW1, CIP Philemon. However, this was not admitted in evidence as the same was not recorded in accordance with the provisions of Section 25A of the Evidence Act.

13. The prosecution then closed its case. Both the prosecution and defence counsel opted to rely on the evidence that had been adduced by the prosecution in support of their different stands. The issue to be determined at this stage is if the prosecution's witnesses adduced sufficient evidence to warrant the accused persons being placed on defence as per the provisions of Section 306 of the Criminal Procedure Code.

14. The offence of murder is defined in Section 203 of the Penal Code as;

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

This definition is very well captured in the Latin maxim

“Actus non facit reum, nisi mens sit rea” which means, The act itself does not constitute guilt unless done with a guilty mind.”

From the definition, three critical ingredients require to be proved by the prosecution, being that:

(a) the fact as well as cause of death of the deceased.

(b) the accused person(s) committed the unlawful act that led to the death of the deceased; (“actus reus or for action”)

(c) at the time the unlawful act or omission was committed the accused person (s) had malice aforethought (what is the “mens rea” or “guilty mind”).

15. To sustain a charge of murder, these ingredients, must according to the law be proved beyond reasonable doubt. In this case, the fact of the deceased's death was brought out by all the prosecution's witnesses who gave evidence that the deceased was found lying dead in a kiosk at Kasarani area in Mtwapa belonging to PW5, Awino Onyiko Bonyo on 23rd May, 2015. The deceased was identified by PW2, Peninna Njeri, his wife to the police and the doctor, so he could perform the post mortem examination. PW6, Dr, Mohamed Munir produced a post mortem report on behalf of Dr. Abubakar Swaleh, the medical officer who conducted the post mortem examination on the body of the deceased to establish the cause of his death. The death of the deceased was not contested nor denied by either of the accused persons.

16. On the issue of cause of the deceased's death, PW7, Pius Kilonzo told court that when he saw the deceased's body, he appeared to have really been beaten as he was still bleeding from the injuries on his head. PW8, the investigating officer told court that he saw the deceased's body had injuries on the left side of the head which were so severe as if he had been hit by a bottle or stone. The conclusive evidence on the cause of the deceased's death was the post mortem report that was prepared by Dr. Abubakar who performed the post mortem examination on the body of the deceased and produced by PW6. Dr Mohamed as exhibit P1. According to the said report, Dr. Abubakar, upon observing the body of the deceased and injuries thereon, formed an opinion that the deceased died as a result of severe head injury causing raised intracranial pressure and massive haemorrhage from the scalp wounds. This evidence was not challenged or contested by the defence in any way. As a result of this, the deceased's death and its cause have been proved beyond reasonable doubt.

17. The next issue for proof by the prosecution is whether the accused persons caused the deceased's death, and if so, whether they did it with malice afterthought. It is the evidence of prosecution's witnesses that the deceased, THOMAS MBEIYA MAMAYI Alias WAIYAKI, was found lying dead at the Kiosk (or drinking den “Magweni”) belonging to PW5, (commonly referred to as “mama nyanya”). The accused persons were arrested and charged with his murder.

18. I have analyzed the evidence of the witnesses and find that none of the witnesses the deceased being killed by either of the accused persons rightly or jointly on by any other person. It is not denied that the deceased was seen at the drinking places that the accused persons and others were drinking on the night before his dead body was found lying dead at the entrance of one of the joints. And in particular, the deceased had been spotted at PW5's joint earlier in the day and later at PW7's joint, both at Mtwapa.

19. According to the evidence, this is also the last place that the accused persons were seen having a drink. This in my opinion is the reason why the accused persons were below suspect arrested and charged with the offence of murdering the deceased. To this, I say, suspicion,

however stay, it not sufficient to warrant one being capable of any offence (see the case of SAWE VERSES REPUBLIC).

20. The only evidence, which I believe the prosecution would have relied on to link the accused persons with the murder of the deceased was a confession statement allegedly made by the 2nd accused person which was expunged from evidence by this court after a trial within a trial to verify its authenticity was conducted.

21. The prosecution's evidence was therefore left bare with nothing tangible against the accused persons. This being the case, I find the prosecution has failed to establish a prima facie case against all the accused persons to warrant them being placed on defence, for the offence of the murder of the deceased.

In the circumstance, I find the accused persons have no case to answer and acquit them accordingly under Section 210 of the Criminal Procedure Code.

Ruling DELIVERED, DATED & SIGNED this 24th day of January, 2019.

D. CHEPKWONY

JUDGE.