



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CRIMINAL CASE NO. 42 OF 2013

REPUBLICPROSECUTOR

VERSUS

MTSUNGA MUMBA PEKESHE.....1ST ACCUSED

JUMAA MUMBA PEKESHE2ND ACCUSED

RULING

1. The accused persons, MTSUNGA MUMBA PEKESHE and JUMAA MUMBA PEKESHE are jointly charged with the offence of murder contrary to section 203 as read with section 204 of the Penal code.

The facts of the case are;

“On the day of 13th July, 2013 at Kasidi village, Ruruma location in Rabai District within Kilifi County, the accused jointly with another not before court unlawfully murdered MOHAMMED MUMBA PEKESHE

2. The accused persons were first arraigned in court on 9th September, 2013, where as per the law, they could not plead to the charge until such time as they will have been assigned a defence counsel and taken for psychiatric examination. This was done and the accused persons were assigned a counsel, Mr Nabwana, now on record. A medial reports dated 10th October, 2012 were presented to court on 28th October 2013, indicating that on 9th October, 2013 the accused persons were examined by Dr. C. M. Mwang’ombe M Med and found fit to plead.

3. The plea was taken on 29th October, 2013 where by each accused person pleaded NOT GUILTY for various reasons on record, the hearing of the case commenced on 29th October, 2014.

4. The prosecution called evidence of four (4) witnesses. Pw1, JUMAPILI NAKASHA NDUNE testified that on 18.7.2013 at about 10.00 am, he was at his farm when he heard screams form their home. He said that it was people calling out “Thief “Thief !”. He rushed to the scene and found Jumaa (the 2nd accused person herein) Madzunga and Tsuma fighting with the deceased who was lying on the ground. Pw1 went on to state that the deceased was beaten because he wanted to have sexual intercourse with the mother to the accused persons, who is his step mother, without her consent. He said that they beat him and he saw broken pieces of wood at the scene. He then told court that he called the area chief for action. He also said that the accused persons did not escape from the scene where there were many people who included one Chilele Kalongo. He saw the deceased had a broken leg with injuries all over the body and was already unconscious.

5. When cross examined, Pw1 told court that he had gone to his shamba with his wife Zawadi (herein after referred to as Pw3) while carrying a basket and panga. He said that he found many people at the scene and saw broken sticks. He also said that there were three assailants who included one Tsuma Maumba who is not in court and the two accused persons. He further said that when he arrived at the scene, he found the accused persons still beating the deceased and they said that he had insulted their mother by claiming that he want to rape her. He said that it was the members of public who were shouting "thief !thief! He denied being the one who assaulted the deceased because of a land dispute between them .He stated that he had only disagreed with the deceased for stealing and eating chicken and he had been charged with threatening to kill him. (Pw1) for which he was sentenced to serve six (6) months imprisonment. Pw1 denied that he had chased the accused person's mother so that he could sell her piece of land. He said that the accused person's mother had got married elsewhere after being chased by the deceased. He further denied selling accused person's palm trees.

6. Pw2, KADZO MUMBA, mother to the accused persons told court that the deceased went to the grave site of the two accused person's father and dug it out. That he then told her to leave or he would rape her since he was now her husband. Pw2 said that on hearing this, she decided to run to her parents' home. And for this reason, she did not witness the accused persons beating the deceased. In cross examination, Pw2 said that the accused persons were not present when the deceased chased her away.

7. Pw3, ZAWADI JUMAPILI Alias ZAWADI HAMISI told court that she was wife to JUMAPILI PEKESHE, who is Pw1 herein. Her testimony was that on 18.7.2013, she was with her said husband on their farm when they heard shouts from the house. She rushed to the scene where she found the deceased having been killed. That her husband then reported to the chief and the police were called to the scene. She also explained that her per husband (Pw1) had arrived at the scene earlier. According to Pw3, although she did not see the deceased being beaten, she said that he was assaulted by the two accused persons and one Tsuma who is still at large because he found them standing next to the body of the deceased.

8. In cross examination, Pw3 said that she was with her husband and son on their farm and that her husband reached the scene first. She confirmed there were neighbors at the scene and claimed that it was her husband who beat the deceased.

9. Pw4, No. 51430 P C JOSEPH NDIRANGU told court that he is based at Kaloleni police station. He said that on 8.7.2013, he was informed by the OCS, Chief Inspector Charles Otieno that he had received a call that there was someone who had been murdered at Kasidi village in Rabai. That, he (Pw4) accompanied the OCS to the scene of crime where they found a crowd of people with the deceased. He observed that the grass at the scene appeared to be disturbed and had blood stains. He stated that the deceased was lying under a tree where he was alleged to have collapsed and died after a fight.

10. Pw1 went on to state that they were informed that the deceased has woken up and proceeded to his father's grave where he pulled out the slab that was covering it and told his step brothers that from that day onwards, he was their father. That he later went to the accused person's mother's house and told her that he was going to sleep with her. She was sent to have responded by telling him that he was her son but he said that he did not want to know about that. Pw4 further said that Pw2 said the deceased was getting hash with her and took off to her paternal home. And the accused person and other brother of theirs embarked in a fight with the deceased. He confirmed the deceased had several injuries on his head and eyes were grugged out.

11. He also said that they called the scenes of crime personnel who came and took photographs of the scene, which he said were damaged. He then said he collected the body and escorted it to Coast General Hospital for postmortem examination which was conducted by Dr Otieno on 24.7.2013.

12. Pw4, told court that, in the post mortem examination report deceased's head, which he enumerated as seven (7) in number, a fracture on the right humerus and left tibia and tibula. The conclusion was that the cause of the deceased's death was head injury. He produced the post mortem examination on behalf of Dr Otieno as Exhibit P1 because there was no dispute over the said death.

13. In cross examination, Pw4 said that the tree where the fight allegedly took place was not in the homestead. He said that the only witnesses he got were those in the home and the uncle to the accused persons and deceased. He also confirmed that he did not get any independent witness because the people who came to the scene declined to record their statements. He said that he did not get any evidence of the deceased having been armed with a panga but was told that he was the one who started the fight he confirmed having charged the deceased with a case of stealing goats at Kaloleni law courts. He was taken through the post mortem report and admitted that it was not indicated there that the deceased's eyes had been gorged out. He also said that he found pieces of stick at the scene but did not record that.

14. The accused persons were placed on defence and each opted to give unsworn and sworn evidence in their defences respectively. They called no witness.

15. The first accused person MUTSUNGA MUMBA PEKESHE, opted to give unsworn evidence whereby he told court that he did not murder his brother Mohamed Mumba Pekeshe and neither did he know the person who murdered him. He said that on 18.7.2013, he was engaged in his casual work when he heard his brother had been killed. He said that it was Pw1 who wanted them jailed so he could grab their piece of land.

16. The 2nd accused, person JUMAA MUMBA PEKESHE also denied the charge of murder against him. He said that he could not have killed his brother and disagreed with the evidence of PW1 who he said had a grudge against them which had developed since their father's death.

He told court that Pw1 wanted to sell their father's property and whenever they try to stop him, he runs to report them to the police station to have them arrested.

17. After the close of the defence case, the counsel for both sides were directed to file and serve written submissions in support of their different positions.

18. At this stage, it is worth pointing out that it is a cardinal principle of law that in a criminal case, the legal onus is always on the prosecution to prove the guilt of an accused person and the standard of proof is beyond reasonable doubt. (See NAIROBI CRIMINAL CASE NO.116 OF 1999, R VRS DAVID RUO NYAMBURA & FOUR OTHERS.

19. For a charge of murder, the prosecution must prove three (3) ingredients beyond reasonable doubt so as to secure a conviction. The ingredients are that:

(a) the death of the deceased and cause of death;

(b) the accused committed the unlawful act which caused the deceased's death;

(c) the accused had malice aforethought when he committed the unlawful act.

20. With regard to the first ingredient, the death of the deceased is not in dispute. This has been confirmed by the evidence of the prosecution's witnesses who all saw the deceased lying dead on the ground with cut wounds on his head, arms, legs and other parts of the body. A post mortem report by a Dr Otieno was produced in consent of both counsel by the investigating officer (Pw4) and apart from confirming the deceased died, it also confirmed the cause of his death. Here, the prosecution has proved the death of the deceased and cause of it beyond reasonable doubt.

21. The second issue is who caused the deceased's death? In this case the accused persons, MUTSUNGA MUMBA PEKESHE AND JUMAA MUMBA PEKESHE were arrested and charged with the offence of murdering the deceased. Apart from Pw1, the other three witnesses who testified in this case told court they found the deceased had already died but did not witness his being attacked or murdered. Pw1 said that he was on his farm when he heard screams from their home and he rushed there. He said that it was about 10.00am. He then said he heard people shout, "thief! Thief!" and rushed to the scene where he found the accused persons and another, TSUMA PEKESHE beating the deceased with sticks. He said that

he saw them fighting the deceased who was lying on the ground. He said that when he inquired why they were beating the deceased, he was told that it is because he had wanted to have sexual intercourse with the mother of the accused persons without her consent.

22. While it is in evidence that the incident happened at 10.00am and the accused persons, deceased and Pw1 are members of the same family so that the issue of mistaken identity would not arise, I find that this is evidence which required corroboration . This is because, both in cross examination and the defence by the accused persons the issue of a grudge between the accused persons and Pw1 kept coming up.

23. According to the accused persons, Pw1 who is their uncle has been trying to evict them for their piece of land from the time their father died, so he can grab the same and sell it. They also claim that whenever they resist, he reports them to the police station. Pw1 only admitted to having had the deceased arrested, tried and convicted. He gave the reason for this as the deceased and another stealing his chicken but at the same time admitted that he was convicted and sentenced to serve six months for threatening to kill without disclosing who the deceased had threatened to kill. This is different from the offence of stealing. It is worth noting that the deceased is brother to the accused persons and would equally have been affected if there was eminent threat to evict them from their land . In view of the claim of a grudge, it would only have been reasonable to have an independent witness come and testify so as to corroborate the evidence that there were so many people at the scene but Pw4 told court that they were reluctant to record statements in this case.

24. Another peculiar issue in this case is that Pw1 told court that he found the accused person in the act of beating he deceased who they beat to death and there were many people gathered. He even said that they did not ran away. However, Pw 2,3 and 4 said that they did not find the accused persons at the scene. There was no evidence by any of the witnesses that the accused persons escaped upon killing the deceased.

25. I find the evidence against the accused persons circumstantial but considered cumulatively, it does not form a complete chain to confirm they committed the offence in question. In the case of KHADIJA MWAKA YAWA VRS REPUBLIC, MOMBASA HIGH COURT CRIMINAL APPEAL NO. 223 OF 2007, the court stated that

“ It is also necessary before drawing the inference of the accused’s guilty circumstantial evidence to be sure that there are no other co-existing circumstance which would weaken or destroy the inferce?

26. In this case, the issue of the existing grudge between the accused persons and Pw1 is an unresolved issue. As for the alibi defence, it was not for the defence to establish that the same was reasonably true or untrue. And with the uncorroborated evidence, the alibi raised by the accused persons though raised late in the day, the doubts in the prosecution evidence have only been enhanced. I therefore proceed to find the doubt created in favour of the accused persons as to whether indeed they committed the unlawful act of murder against the deceased.

Having found so, I find no reason of dwelling into the third ingredient of malice aforethought, even though it was alleged that the deceased was beaten by the accused person because he wanted to rape their mother, Pw2. In the upshot, I find that the prosecution failed to prove the offence of murder against the accused person who I find not guilty and proceed to acquit them for the same under section 215 of the Criminal Procedure code.

It is so ordered.

Delivered, dated signed on this 24th day of October, 2019.

D. O. CHEPKWONY

JUDGE