



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CRIMINAL CASE NO. 52 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

KADHI KENDAGOR CHEPKONGA.....ACCUSED

JUDGMENT

1. The accused person, KADHI KENDAGOR CHPKONGA is 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 12th day of October,2013 at around 9.30 am at Shauri yako estate in Kisauni within Mombasa County the accused person murdered MOSES KANYARO KABETE.”

2. The accused person was first arraigned in court on 25.10.2013 when he was informed of the charge against him and remanded in custody to await medical examination by a psychiatrist and being assigned counsel.

3. On 15th November, 2013 the plea was taken and the accused person pleaded NOT GUILTY. The hearing commenced on 17th July, 2014.

The prosecution called evidence of seven (7) witnesses.

4. Pw1 REBECCA KARIMI MURIUNGI testified that on 12.10.2013 at 7.00pm, she was at Kongowea, where she sells palm wine but left for her home at Shauri Moyo at 9.00pm. She found Moses, the deceased near the house. As she went for the keys, the deceased came to the door appearing angry and was quarrelling with the accused person. Pw1 said that the deceased was holding a knife and he slipped and fell on it. She said that at the time, the accused was not present as he had already left. She had said that she saw he knife properly, she again turned to say that she had not seen the knife properly but it was a kitchen knife. Pw1 went on to say that the deceased was taken to Coast General hospital by members of public and she was told that some piece of knife had been left lodged in his body.

5. Pw2, SOLOMON ODERE told court that on 12.10.2013, he was near some food stalls at Shauri yako in Nyali – Kisauni when he saw a man and woman chasing each other. He identified the man as the accused person and the woman as Pw1 in this case who he said he had known as husband and wife for a long time. Pw2 said that the accused person produced a knife and stabbed Kanyaru, the deceased who is a brother to Pw1, at the stomach. He identified the kitchen knife before court as Mf1,P1. That after this, the accused rushed out and left the deceased crying. He then said that the deceased who had a part of the

knife inside the body was rushed to Coast General Hospital and the matter reported to the police, station after he was pronounced dead.

6. Pw4, No 231463 Assistant Superintendent of Police, PHENEAS MUTWEI RINGERA told court that he was the OCS, Nyali police station and on the morning of 14.10.2013, as he perused the OB, he came across a case where someone had booked a case of assault where the victim had been referred for treatment. He said that the allegations were that the accused person had been assaulted by one Moses Kanyaru at Shauri yako village . Pw4 said that he also came across a report which had been made by one Rebecca Kanyari that her brother, Moses Kanyaru had been assaulted by the accused person and was admitted at Coast General Hospital in serious condition. Pw4 then sent an officer by the name Joel Mugambi to Coast General Hospital to confirm this report.

7. Pw4 then wrote a letter to the in charge Military police requesting that they produce the accused person. And later, Rebecca Kanyari (Pw1) reported back that the deceased had passed away while undergoing treatment at the Coast General Hospital. Pw4 enumerated the O.B entries of the events of the incident as they were reported. He also identified a handle to a knife he alleged Kanyari had informed them was a part of the knife that the accused had used to assault the deceased with, which she alleged she had collected it from the scene at Shauri Yako village. The same was handed over to him and he in turn handed it over to one IP Sawe the investigating officer in this case, together with the letter he wrote to the in charge, Military police.

8. That the accused person was handed over to Nyali police station by officer from Nyali Barracks in Mombasa on 16.10.2013 at 17.50 hours and Pw4 booked him in the cells vide OB No 61/16/10/2013 as IP Sawe commenced investigations into the incident. Pw4 produced the knife handle as exhibit P1 and the letter to the in charge, Military police as Exhibit P3.

9. Pw5, CIP Martin Sawe testified and confirmed that on 13.10.2013 he was at his office when, at 8.00 hours, Pw4, Mr Mutwiri ,Minute a case where a reporter Rebecca Kanyari had reported that her brother by the name Moses Kanyari had been assaulted by someone known to her and was in hospital. He read through the report vide the OB and commenced investigations. He said that the following day, the repoteer returned to the station and reported that her brother who had been admitted in hospital had died. Pw5 charged then changed the charge against the accused person from one of assault to one of murder. He went to hospital after visiting the scene at Shauri yako village. They also recovered the handle to the knife and proceeded to Coast General hospital where the blade which was alleged to have stuck in the deceased's body was handed over to him. Pw5 charged the accused person with the offence of murder. He produced the blade to the knife as Exhibit P1b. He said that the eye witness was the deceased's sister, who explained what had transpired and said it was because her late brother was opposed to the love affair between herself and the accused person because it had not been good.

10. Pw6, DR JILLIAN NJAMBI MUIRURI said that the postmortem examination on the body of the deceased was conducted by DR ABUBAKAR who was no longer working with Coast General Hospital but had worked with her for a period of 4 months. She was however stood down when it was realized that the report had no stamp from the hospital so that the same could be regularized or clarified.

11 Pw7, No 63512 Sergeant JOSEPH NYASIMI told court that he had taken over the case from IP Eliud Kimwela in October, 2015 who handed over the file in respect of this case which was complete and included a post mortem examination report which had been completed and signed by Dr. Abubakar at Coast General Hospital. He identified the form and said that he had been unable to bond the said doctor for it had been said he was out of the country. He then produced the post mortem report as Exhibit P4.

12. The prosecution closed its case and the accused person was placed on defence. The accused person opted to give a sworn statement in defence and called no witness.

The accused person, KADHI KENDAGOR CHEPKONGA denied that he murdered the deceased MOSES who he said he had known for a period of two years before his death. He said that he also knows the deceased's sister, Karimi Kanyari. The accused testified that he met the deceased at his sister's place

of work at Shauri Yako estate in Nyali where he was selling palm wine for his sister, who he was with. He said that the deceased who was already drunk, was sitting outside. The accused person said that after some time, he was leaving to go and buy a cigarette when the deceased told him that his being an army officer would end there. And since he did not want to engage the deceased, the accused person started walking away as the deceased's sister asked him to take pre-caution because her brother was armed with a knife.

13. The accused went on to state that as he went down the stairs, he saw the deceased trying to climb the stairs. He moved back a bit and saw the deceased lose balance and fall down at the door. The accused said he avoided the deceased and left without knowing whether he was injured or not. The accused stated that the following day the deceased's sister called to tell him that her brother had landed on the knife he had been carrying and it had stabbed him.

14. The accused denied contributing to the deceased's death. He told court that there were lights in the house which lit the outside and acknowledged that there were neighbours nearby like Solomon Odongo who lived about three meters from the house where they were that night. He said that Moses was not at the scene for if he was, he would have seen him but he did not. He also denied that he was injured by the deceased and stated that had this happened he would have complained and or reported to the police station. He said that the deceased died out of drunkenness.

15. At the close of the defence case, counsel for both sides were directed to file and serve written submissions. If any, in support of their different stands in this case.

16. I have considered the evidence that has been adduced by both sides, the written submissions by both parties, cited authorities together with the law, as to establish if the prosecution has discharged the burden of proof required in a criminal trial. It is a cardinal principle in law that in a criminal trial, the legal onus is always on the prosecution to prove the guilt of the accused person and the standard of proof is beyond reasonable doubt.

17. For a conviction to be secured in an offence of murder contrary to section 203 of the Penal Code, there are (3) three ingredients which the prosecution must prove beyond reasonable doubt, which are that;

- (a) the death of the deceased and the cause of death;
- (b) the accused committed the unlawful act which caused the death of the deceased;
- (c) the accused had malice aforethought in causing the unlawful act.

The three ingredients emanates from the provision of section 203 of the Penal code which states that;

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

18. With regard to the first ingredient, it is not in dispute that the deceased died on the night of 12th October, 2013. This is confirmed from the uncontroverted evidence of all the prosecution witnesses and the post mortem report which was produced by Pw7, No 63512, Sergeant JOSEPH NYASIMI where Dr. Abubakar, upon conducting the post mortem examination on the deceased's body concluded that the deceased had died as a result of hemorrhagic shock secondary to trauma to the head.

19. The second ingredient is with regard to who caused the deceased's death, which is the unlawful act?

In this case, the accused person was arrested and charged with the offence of causing the death of the deceased. I have analyzed the evidence of the prosecution's witnesses with regard to what led to the deceased's death, so as to establish who caused the same.

According to Pw1, REBECA KARIMI on the alleged day, she found the deceased who is the brother and

appeared angry near her house at about 9.00pm. She said he was quarrelling with the accused person while holding a knife. She said that the accused person then slipped and fell on the knife and was taken to hospital by members of public. When cross examined, Pw1 told court that the deceased used to imbibe a lot of palm wine and was very drunk on this night. She said that the accused person did not stab the deceased.

20. Pw2 told court that he was near some food stalls which are about 2 to 3 meters from where the deceased was. Pw2 testified that he saw the accused person and Pw1, who is his wife chasing each other on 12.10.2013 but could not tell what time it was. That he then saw the deceased, who is a brother to Pw1, follow them and the accused person produced a knife with which he stabbed him with. He said that the deceased was left crying as the accused person ran away.

I find the evidence of these two witnesses contradictory and yet they are allegedly the only eye witness to the incident availed by the prosecution. The question that then comes to my mind, is who between the two has given a true account of what happened on the night that the deceased died?

21. An examination of the evidence of Pw1 brings out a person who is consistent even in cross examination. On the other hand Pw2's evidence is full of contradictions. For instance, while he told this court that he saw the accused person produce a knife and stab the deceased. In cross examination, Pw2 said that it is the accused person who told him that he had been stabbed by the accused person. Under any other circumstance, this would have been taken to be a dying declaration but not with the contradictions presented by Pw2.

22. In his evidence in chief, Pw2 told court that the deceased was stabbed on this stomach, without indicating which side of it. But when he was cross examined, it came out that he had recorded in his statement to the police that the deceased sustained injuries to the chest. He again went on to state that it was on the left side without indicating the part of the body which was stabbed.

23. Again, Pw2 testified in his evidence in chief that a part of the knife remained inside the deceased's body and when cross examined, he said the knife. On re-examination, Pw2 said that he saw the knife after he had already recorded his statement.

24. Clearly, it will be noted that apart from giving evidence which contradicted the evidence of Pw1, a sister to the deceased and also an eye witness, Pw2's evidence is in itself full of contradictions that one is left with no other conclusion but to find him an incredible and untruthful witness.....the land kind are found in communities and can build on an incident to the extent that there will be many versions that one will not know which version to believe .

25. There was also the evidence of Pw3 and Pw4, the OCS of Nyali police station then and investigating officer respectively. They alleged that they received a report and or information from Rebecca Kanyari (Pw1 herein) that her brother Moses Kanyari the deceased had been assaulted by the accused person. This I find quite inconsistent with the evidence of Pw2 where she did not mention having gone to report the incident, and then she denied that the accused person stabbed the deceased. Pw1 is a witness the investigating officer presented as one of the witnesses for the prosecution and yet was giving evidence which was not in tandem with what they wished to achieve ... evidence to support their case. She was not declared a hostile witness and therefore her evidence is to be regarded as credible evidence by the prosecution.

26. Another issue I find to be of concern is that according to Pw1, the deceased was taken to hospital by members of public, which means there were people who were at the scene, saw what happened but would not give evidence. It is not even explained why none of them recorded their statements. Also, Pw2 who was at the scene did not accompany the deceased to hospital but is silent on who did not do that.

A question arose as to whether the "pieces of knife " that was allegedly used as a murder weapon were subjected to a forensic examination to establish who had handled it, and whether the accused person was one of them. This did not happen.

27. From the foregoing analysis , it is clear that the prosecution evidence is full of contradictions inconsistencies, gaps and lots of un answered questions that it renders the prosecution claim that the accused person caused the deceased's murder doubtful. And with the doubt that has been created in my mind by this evidence, the same can only be resolved in favour of the accused person.

28. In his defence, the accused person gave evidence which was in tendem with that of Pw1. But having found as I have above, I will not dwell into it.

For the issue of whether the accused person had malice aforethought, having found that there are doubts as to whether he committed the said unlawful act, I also find that no evidence was adduced by the prosecution that the accused person had any ill intention towards the deceased. It only came out in the evidence of Pw4 that pw1 had told them that the deceased person did not favour her relationship with the accused person but it was not corroborated by any other evidence.

29. All in all, it is this court's finding that the prosecution has failed to meet the threshold in respect of proving the murder charge against the accused person for a conviction to suffice. I proceed to find the accused person NOT GUILTY of the offence of murder contrary to section 203 of the Penal code and acquitted him under section 215 of the Criminal Procedure Code.

Orders accordingly.

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

D. O. CHEPKWONY

JUDGE