



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL (MURDER) CASE NUMBER 31 OF 2014

REPUBLIC..... PROSECUTOR

AND

ISSA ABDALLAH WAMUKOYA..... 1ST ACCUSED

HAMSA ANANGWE MAKOKHA.....2ND ACCUSED

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Introduction

1. The two accused persons, Issa Abdallah Wamukoya and Hamsa Anangwe Makokha are charged with **murder** contrary to **Section 203 as read with Section 204 of the Penal Code**. The particulars of the offence are that on the 21st day of June, 2014 at Ejinja village Koyonzo sub-location in Matungu district within Kakamega County, they murdered ISMAEL WATOTA WAMUKOYA.

2. Both accused persons denied the allegation. The case proceeded to full trial during which the prosecution called 6 witnesses to testify against the accused persons.

The Prosecution Case

3. PW1, Fauzia Anita Abdalla (Anita) testified that on 21/6/2014 at about 7.30 p.m., she was inside her house with her grandchildren when she heard Issa speaking from outside the house and saying, “**Open. I want to kill your husband.**” She went outside, but on realizing the seriousness of those words, she returned to the house immediately and locked herself in the house with the children. While she was in her bedroom she heard footsteps walking in the direction of Issa’s house which was only 15 metres away. She also heard Issa saying, “**I will kill somebody today.**” Then Issa came back some little while later shouting loudly that he would kill somebody that day.

4. Anita then heard both Issa and Hamsa asking from outside her house whether her husband had come back. Issa asked her to call him but she did not do so, so both Issa and Hamsa went away. They came back a third time and while the two of them were still at Anita’s door step, her husband came home and he asked them why they wanted to kill him.

5. It was then that Anita had a scuffle with Issa saying “**I am cutting you.**” Anita could even hear the cutting going on. When she opened the door she saw her husband lying on the ground and having a cut on the right side of the head. There was also another cut on the back side of the head, on both hands and on the backside.

6. At that sight, Anita took the children and ran to a neighbour’s house as she screamed. She left the children at the neighbour’s and ran to the police station to make a report. By the time Anita returned to the scene with the police, her husband, the deceased was dead. She had left the house when he was still alive. The body was thereafter taken away by the police to the hospital, but he was pronounced dead on arrival. Anita also reported to one of her in laws that Issa had killed the deceased. She later recorded her statement.

7. In her further testimony, Anita testified that there was a grudge between Issa and the deceased over trees for sale and that the two accused persons are nephews to the deceased. On 22/6/2014 she went to the mortuary and identified the body for postmortem examination.

8. During cross examination, Anita stated that when she recorded her statement with the police, she used the names EBBY ANITA WETOTO, names she was using before she got an ID. She also testified that during the entire incident she was inside the house, but that she heard the two accused persons as they talked loudly, especially Issa. She said she did not hear Hamsa talk. Anita also testified that though she did not see the deceased being cut, she could hear the sound as the deceased was being cut. Anita also testified that in her statement, she had said Issa cut deceased with a panga and then went to his house and returned with an axe. She reiterated her statement in chief that she heard Issa saying “**I am cutting you**” as the deceased screamed.

9. In re-examination, Anita stated that she was hearing Issa most of the while though she also heard Hamsa talking to Issa as they came to her door.

10. PW3 was David Gari of Kabras sub-county (David). On the 23/6/2014 while on duty, he received a report from Anita regarding the incident herein. She reported that Issa and Hamsa had cut the deceased. Together with 4 other officers, PW3 went to the scene where they found the deceased lying in a pool of blood near the deceased’s house. The deceased had a deep cut on the side of the head. With the help of the area Member of County Assembly (MCA), the deceased was rushed to the hospital but he was pronounced dead on arrival. The body of the deceased was taken to the mortuary.

11. After the body was put in the mortuary David and other officers rushed back to the scene which was also the compound of the two accused persons. They were each arrested from their respective houses and taken to the police station for further action. David stated that he recovered a blood stained panga from Issa Abdallah’s house, which he later handed over to the police.

12. Number 23059294 Cpl Moses Wanyama Wafula testified as PW4. He stated that on 21/6/2014 at about 9.00 p.m., he received information from his boss, David about the incident herein. Together with two other officers, CPL Wafula accompanied Anita to her home where they found the deceased lying in a pool of blood on the ground. CPL Wafula stated that Anita informed him and his colleagues that it was Issa Abdallah who had attacked the deceased. Though the deceased seemed to be alive, his condition was not good. With the help of neighbours the deceased was taken to St. Mary’s mission hospital Mumias, before CPL Wafula and his colleagues returned to the camp.

13. At about midnight, PW4 received a report that PW1 had also been attacked by Issa Abdallah, thus forcing PW4 and colleagues to return to the scene. On arrival at the scene, they went to Issa’s house and asked him to open but for a long moment, he did not open the door and only agreed to so when the police threatened to break down the door. Issa was immediately arrested with the help of PW3 and APC Wycliffe Obae and Antony Ikodiwe. On searching the house, the police recovered a panga and an axe under the bed. The officers also arrested Hamsa and took both of them to Ejinja police post. The panga and the axe were blood-stained. Both suspects were later handed over to the police, together with the blood stained panga and the axe.

14. During cross examination, PW1 testified that both the panga and the axe had fresh blood on them. The two items were produced as Pexhibit 1 and 2 respectively. PW4 also stated that when PW1 went to report the incident, she mentioned that it was Issa who had attacked the deceased with the help of Hamsa.

15. Dr. Nyumbile Boniface Ndalu testified as PW5. He is the one who carried out postmortem examination on the body of the deceased on 23/6/2014. PW5’s general observations were that the deceased’s clothes were all blood stained and the body stiff. Externally there was a deep cut wound on the anterior aspect of the left thigh measuring 6 cm x 3 cm with sharp margins. There were also three other deep cut wounds on the left side of the chest posteriorly with the largest of them measuring 8 cm x 3 cm and having sharp margins.

16. There were also bruises on the deceased’s left shoulder, exposing underlying soft tissues. There was also a deep cut wound on the dorsal aspect of the left hand (the outside of the palm) causing disarticulation of the metacarpo-phalangeal joints.

17. PW5 also stated that the deceased’s head had three cut wounds over the left temporal region with the largest of them measuring 7 cm x 2 cm while the smallest was 3 cm x 1 cm. On the same left side, there was a comminuted fracture of the skull involving temporal bones and the bone just behind the head. There was also intracranial haemorrhage with brain laceration.

18. In Dr. Nyumbile’s opinion, the cause of the deceased’s death was multiple organ failure. The postmortem report was produced in evidence as Pexhibit 3. In response to a question from the court PW5 stated that from the nature of the injuries, a sharp object such as a panga was used to attack the deceased, since the injuries appeared quite uniform.

19. The last witness PW6 was number 62046 PC Richard Tum. He received the report of this incident while he was on other duties in Busia on the evening of 21/6/2014. At about midnight, he got back to Mumias police station and received the two accused persons who had been arrested on allegations that they had killed the deceased. PW6 also received an axe and a panga which were blood stained.

20. On the morning of 22/6/2014, PW6 recorded witness statements before organizing for a postmortem examination which was done on 23/6/2014. He thereafter charged the two accused persons with the offence of murder.

21. When PW6 was cross examined he testified that he did not take any pictures of the scene and further that he did not subject the panga to any chemical analysis. PW6 also testified that he did not conduct any identification parade.

The Defence Case

22. The first accused person, Issa Ashikomera Abdallah Wamukoya testified as DW1. He testified that on 21/6/2014 at around 1.00 a.m. he was in his house with his family when he heard a knock at the door by PW1. PW1 called out his name. On opening the door, he saw 4 police officers who told him, “**Uko chini ya ulinzi.**” Later the second accused was brought to where he was and together they were taken to Ejinja police post. On the following day he was informed he was being held in connection with the death of the deceased. DW1 denied killing the deceased. He also denied going to PW1’s house on the material evening.

23. In cross examination DW1 conceded that the deceased was his father's brother. He also stated that he passed by the deceased's house at around 7.45 p.m. when he was coming from the mosque, and that there is no other house between his house and that of the deceased. He also testified that as he passed by the deceased's house, he heard children talking inside the house.

24. The second accused person, Hamsa Anangwe Makokha testified as DW2. He testified that on 21/6/2014 between 1.00 a.m. and 2.00 a.m. he was asleep in his house when he heard a knock at the door and a voice of one of his cousins calling his name and asking him to open the door so he could have a place to sleep. The cousin is one George Okumu.

25. On opening the door, DW2 said he saw his cousin in the company of two administration police men, Anthony and Obae. He was then told to dress up. After doing so, he was arrested and taken to Ejinja police post where he found his co-accused and PW1. They were all taken to Mumias police station without him being told why he had been arrested. On the following day which was 22/6/2014 at around 8.00 a.m. he was informed he had killed the deceased who is his paternal uncle. DW2 denied killing the deceased. He also denied being at the deceased's house or near it on that fateful evening, and that the only time he saw the deceased's family was around 2.00 p.m. as he passed by on the way to his own house.

Issues for Determination

26. The offence of murder is clearly defined under *section 203 of the Penal code* as well as *section 206 of the Penal Code*. The latter section defines malice aforethought. For the prosecution to prove the offence, it must prove the following ingredients:-

- a. Death of the deceased.
- b. Cause of that death.
- c. That the accused persons, either separately or jointly caused the death of deceased.
- d. That they did so with malice aforethought.

Submissions

27. Through their counsel, Mr. Sammy Wekesa, the two accused persons submitted that the prosecution herein had failed to prove its case against the two accused persons to warrant the two of them being convicted of the offence of murder. That the evidence on record does not meet the standard of proof of beyond any reasonable doubt. Counsel also submitted that there is no evidence of the existence of any bad blood between the two accused persons and the deceased as would cause the accused persons to attack the deceased.

28. Defence counsel also questioned why none of the minors who were in the house with PW1 was called to corroborate PW1's evidence, and further, counsel questioned whether PW1 arrived at the police post with any of the said minors or not.

29. In his final submissions, prosecution counsel Mr. P. O. Juma told the court that the prosecution would rely on the evidence on record.

Analysis and Determination

30. I have now carefully considered all the evidence on record and find that the parties in this case are members of the same family with the deceased being the brother to the father of the two accused persons. In her testimony PW1 stated that the accused persons had a dispute with the deceased over the sale of trees. In considering the issues in hand I have to bear this piece of evidence in mind and also remember that according to PW1, her recognition of the deceased's killers was through voice identification. I now move to consider the issues.

Death and cause of Deceased's Death

31. It is not in dispute in this case that the deceased died. PW2, Rehema Were Okumu, plus all the other 5 witnesses testified of the fact that the deceased died. PW3 and PW5 are the ones who rushed the deceased to Saint Mary's Mission Hospital Mumias after they found him bleeding profusely while lying on the ground just outside his door. The deceased was pronounced dead on arrival at the hospital. PW2 confirmed that after the postmortem examination the body of the deceased was given to the family for burial.

32. PW5 confirmed to the court that he carried out a postmortem examination on the body of one ISMAEL WETOTO WAMUKOYA on the 23/6/2014 at about 3.00 p.m. On examination of the body PW5 saw deep cut wounds on the anterior aspect of the left thigh and three deep cut wounds over the left side of the chest bruises over the left elbow and a deep cut wound over the dorsal aspect of the left hand. The deceased also had three cut wounds on the left temporal region of the head with a comminuted fracture involving the left parietal bases and accompanying intracranial haemorrhage with brain laceration.

33. In the opinion of Dr. Nyumbile, the cause of the deceased's death was multiple organ failure.

34. There is therefore no doubt about the deceased's death and the cause of that death.

b. Whether it was the accused persons who caused the deceased's death

35. According to PW1 she was in her house with her grandchildren at about 7.30 p.m. on 21/6/2014 when she heard Issa, first accused speaking from outside her house and saying "Open. I want to kill your husband." Though she stepped out of the house for a brief moment

she went back into the house and locked herself in there with her grandchildren for fear that Issa would attack them. For a second time, PW1 heard Issa saying, “**I will kill somebody today**” as footsteps disappeared towards Issa’s house. For a third time, PW1 heard Issa speaking in aloud voice and saying “**I will kill somebody today.**” Then soon after that PW1 heard the voices of both Issa and Hamsa from outside her house, asking her to tell them whether the deceased had come back; and Issa also asked her to call him but she refused. The two accused persons then went away, but returned to her door soon thereafter and it was then that the deceased came back home. She heard him ask the two accused persons why they wanted to kill him and a scuffle ensued. PW1 heard Issa telling the deceased, “**I am cutting you.**” PW1 also stated she heard the panga cutting on somebody as the attack continued. She opened the door and saw the deceased lying on the ground with many cuts all over his body. He was bleeding profusely. The two accused persons had run away from the scene of the attack.

36. Thus, the evidence against the two accused persons is that of a single witness who recognized them through their voices. I am of course aware of the dangers of relying on the evidence of one single witness to found a conviction although there is no specified number of witnesses required to prove any fact. In *Abdalla Wendo -vs- Rex [1953] 20 EACA 166*, the court held inter alia, that “**Although subject to certain exceptions a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of such witness respecting the identification especially when it is known that the conditions favouring a correct identification are difficult. In such circumstances, other circumstantial or direct evidence pointing to guilt is needed.**” That was also the holding of the Court in *Nganga -vs- Republic [1981] KLR 483* where the Court stated that the evidence of identification of a single witness should be carefully tested and that where an accused is unrepresented it is the duty of the trial court to question the witness to establish his recognition.

37. In the instant case, the two accused persons are members of the same family and well known to PW1. They all lived in the same compound. I therefore have no reason not to believe PW1 when she testified of the voices of the two accused persons, especially Issa, issuing threats that he would kill somebody that day and later telling the deceased, “**I am cutting you.**” I am satisfied that there was no mistaken identity as to who was speaking within the hearing of PW1 on that material night.

38. On that same night the two accused persons were arrested from their respective houses, and from Issa’s house a blood stained panga and an axe were recovered. PW6 stated that he did not subject the panga and the axe to any chemical analysis but the doctor, PW5 testified that the injuries sustained by the deceased could only have been caused by a sharp object such as a panga. Although the panga was not subject to any testing by the government chemist, I have no doubt in my mind that the deceased was attacked with a panga and that it was Issa and Hamsa who did so.

39. Another point to note here is that though motive is not necessarily required to prove murder, in the instant case, there was a dispute between the two accused persons and the deceased. In my considered view, the said dispute over sale of trees was sufficient motive for them to want to attack the deceased. I am also satisfied that the two accused persons had a common purpose of attacking the deceased and that is why they announced as they passed by the deceased’s house that someone was going to be killed that day. I am satisfied that their actions were the direct cause of the deceased’s death, and that each one of them actively participated in doing so. It is immaterial who held the panga and raised it against the deceased. The fact that Issa and Hamsa were together satisfies the provisions of **section 21 of the Penal Code**. The section provides that “**when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with another, and in the prosecution of such purpose, an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.**” in this case, the two accused persons walked hand in hand as they announced their intention to kill somebody that day. What followed thereafter was a probable consequence of what they announced they would do.

40. In this case also, there was no suggestion during cross examination that PW1 had fabricated this case against the two accused persons for whatever reason so I am satisfied that the two accused persons were properly identified and that they formed a common intention to attack the deceased and executed that intention by attacking the deceased just outside his house and cutting him all over the body.

c. Whether there was malice aforethought

41. Mens rea is an ingredient of the offence of murder under Section 206 of the Penal Code. In my considered view *mens rea* was proved. First of all for the better on the fateful evening Issa and Hamsa made their intentions known that they were out to kill somebody. Although in their defence, they denied doing so the evidence on record places them around the deceased’s house between 7.30 p.m. and 7.45 p.m. when they said they were passing by. The evidence is also clear that their common intention was to cause death or do grievous harm to the deceased and when finally Issa announced “**I am cutting you**” to the deceased, that announcement sealed their intention to attack the deceased and to kill him. The deceased was indeed the person who was to be killed that day.

42. In any event the extent of the injuries suffered by the deceased were such that anybody inflicting such injuries had no other intention than that the deceased should die. I am therefore satisfied that malice aforethought was proved in this case.

43. There is one other small issue I want to say something about before I conclude this judgment though the same was not raised by the defence. In the charge sheet, there is no mention that the two accused persons were “**jointly charged.**” Normally the words “**jointly charged**” would form part of the charge, but looking at the totality of the evidence on record and as both accused persons were represented by counsel the said omission or irregularity has not occasioned the accused persons any failure of justice.

Conclusion

44. From the foregoing I am satisfied that the prosecution has proved the offence of murder against the two accused person beyond any reasonable doubt. I therefore find ISSA ABDALLAH WAMUKOYA and HAMSA ANANGWE MAKOKHA **guilty of the murder of ISMAEL WATOTA WAMUKOYA** on the 21/6/2014 and convict each one of them accordingly under **section 322(1) of the Criminal Procedure Code**.

45. It is so ordered.

Judgment written and signed at Kapenguria

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Kakamega on this 29th November, 2019

WILLIAM M. MUSYOKA

JUDGE

In the Presence of:-

Ms. Omondi for State

Issa Abdallah Wamukoya - 1st Accused

Hamsa Anangwe Makokha - 2nd Accused

Erick – court assistant