



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL DIVISION.

CRIMINAL (MURDER) CASE NO. 9 OF 2014

REPUBLIC.....PROSECUTOR

V E R S U S

FREDRICK INDECHE ASAMANI.....1ST ACCUSED

ALFRED BUTICHI MBEHELO.....2ND ACCUSED

J U D G M E N T

The Charge

1. The two accused, Fredrick Indeché Asamani and Alfred Butichi Mbehele are charged with murder contrary to section 203 as read with section 204 of the Penal Code Cap 63 Laws of Kenya, the particulars of the offence being that on the 16th day of February 2014 at Shirumba Location in Kakamega County, jointly with others not before court murdered Francis Ashiono Shiroko.
2. On 7th April 2014, the two accused took plea and denied committing the offence. The trial has been going on since then. The prosecution called 8 witnesses. Each accused gave sworn evidence but called no witnesses.

The Prosecution Case

3. From the testimonies of the 8 witnesses, the prosecution case is that on 16th February, 2014 at about 7.00 pm, the deceased who was at home with his wife Emmah Khasungu Ashiona, PW4 (Emmah) told Emmah that he was going out to meet with friends. At about 8.00 pm, that same evening Josephat Kwayela Mbalasi, PW3 (Josephat) heard the voice of the deceased as the deceased walked along the road.
4. A little while later Josephat heard the deceased's voice inside his (Josephat's) compound. Josephat decided to go outside and see what was happening only to find the deceased lying on the ground and making insulting utterances in a drunken manner. As the home of the deceased was only about 800 metres from Josephat's home, Josephat decided to go and call the deceased's family members to take him home.
5. On arrival at the deceased's home, Josephat first went to the home of the deceased's son called Anzika but found him unwell. He then went to the house of Patrick Mukokho Ashiono PW2, (Patrick) but Patrick was not willing to accompany Josephat to where the deceased was in Josephat's compound. Josephat decided to go back to his home. On return to his home, Josephat went to his mother's house to ask her for her cellphone which had a torch so that he could take a better look at the deceased. Apparently the light from the moon was not adequate.
6. When Josephat shone the light at the deceased, he saw blood – soaked clothes. The deceased had cut wounds on the face and on the head. On noticing the injuries Josephat ran back to the deceased's home and informed the family that the deceased was injured. Emmah and her daughter Sheila Masiswa also known as Abigael PW4 (Sheila) and Patrick accompanied Josephat back to the scene. Arrangements were made to take the deceased to hospital that same night. Bonfasi Liuba Libuli, PW5 (Bonfasi) a motor cycle rider assisted the family to take the deceased to Mukumu Mission Hospital where he was pronounced dead on arrival.
7. Post – mortem examination was conducted on the deceased's body on 18th February, 2014 by Dr. Dixon Mchana Mwaludindi at the Kakamega County General Hospital. Patrick identified the body of the deceased to the Pathologist who testified as PW8. According to Dr. Mchana the deceased had two deep cuts one on the face on the right side of the cheek below the eye with a flap with fracture of cheek bone, and the second on the left side of the scalp to the back with a fracture of the bone below. There was bleeding both above and below the covers of the brain. The blood drained into the brain. In doctor Mchana's opinion, the cause of death was penetrating head injury secondary to sharp trauma following assault. The Burial permit being No. B571372 was filled, duly signed and stamped by Dr. Mchana and produced in evidence as Pexhibit 10.

8. On the 17th February, 2014 at about 9.00am No. 92263 PC Rosemary Borr who was then DCI , Kakamega South received a report of the incident, and after taking the report went to the scene in the company of PC Langat (Not called as a witness) . At the scene, Pc Borr recovered a blood stained, panga – Pexhibit 8. On her return to the Police Station, the two accused were taken to the police station by members of the public. She re- arrested them from members of the public.

9. PC Borr, who testified as PW7 also stated that she went back to the scene with the two accused and took them to their respective houses for a search . From the house of the 2nd accused, Alfred Butichi Mbehelo PC Borr recovered the following items:-

- A brown shirt with maroon stripes – pexhibit 1
- A faded blue shirt – Pexhibit 2
- A white shirt with blue stripes – Pexhibits 3
- A blue jeans jacket – Pexhibit 4

10. PC Borr stated that he recovered the following items from the house of Fredrick Indeché Asamani:

- Green and grey striped T- Shirt – Pexhibit 5
- Grey T- Shirt with Blue stripes – Pexhibits 6
- Brown T- Shirt with black stripes – Pexhibits 7

11. It was PC Borr's further evidence that the above exhibits together with blood samples taken from the deceased and each of the accused and the panga were taken to the Government Chemist Nairobi, under the escort of Senior Sgt , Githae for analysis.

12. The analysis was done by Elizabeth Waithira Oyiengo PW6. From the DNA examination of two blood samples no blood of the deceased was traced to the clothes of either accused. PW6 also testified that the blood found on the panga was not related to any blood samples that had been forwarded to the Government Chemist for analysis.

Defence Case

13. At the close of the prosecution case, the two accused were each put on their defence. Each close to give sworn testimony but called no witness.

14. The first accused, Fredrick Indeché Isanya testified that he made a living out of making bricks and is also a farmer. He testified that he knew the deceased Francis Ashiono Shiroko and that their homes were not far from each other. He denied having anything to do with the death of the deceased. He denied any knowledge of the panga- Pexhibit 8. He however conceded that the clothes produced in court as Pexhibits 3,4,and 6 were his but he said he had no idea how the clothes had got into the hands of the Police . He denied that the deceased mentioned his (1st accused) name as one of the four people who attacked him (deceased).

15. The second accused, Alfred Butichi Mbehelo also denied the allegations made against him. His side of the story was that at no time on the material day did he meet the deceased. He also denied ever meeting his co-accused on the material day. He stated that he was asleep in his house at the time of the alleged offence. Though the 2nd accused admitted that PExhibit 5 and 7 were his clothes, he added that the blood on the clothes had splashed thereon after an assault some 4 months prior to the date the clothes were recovered from his house. The 2nd accused further explained that as a result of the earlier assault he lost two upper teeth (The gap in the upper line of teeth was seen by the court.)

16. During cross examination, each of the two accused confirmed they had no grudge with any of the witnesses who testified against them.

Submission

17. At the close of the hearing, Mr. Nyikuli Advocate, appearing for both accused submitted that the prosecution had not proved its case against the accused person beyond any reasonable doubt. He submitted that the allegation that the deceased mentioned the names of the two accused did not find any support in the testimony of Josephat who was the first person to arrive at the scene. Counsel urged the court to dismiss the case against the two accused and to acquit them.

18. In response Mr. Samson Ngetich who appeared for the state submitted that the prosecution had proved its case against the accused beyond any reasonable doubt. He further submitted that the prosecution case rests on the dying declaration in which the deceased named the two accused as having been among four persons who had assaulted the deceased. He also submitted that the extent of the injuries inflicted on the deceased were proof that the accused intended to kill the deceased or inflict serious injuries on him.

19. Finally the prosecution submitted that the defence case comprises of mere denial which did not in any way shake the prosecution case against them. Counsel urged the court to find the two accused guilty as charged, convict them and sentence them in accordance with the law.

Issues for Determination

20. For the prosecution to succeed in this case, the ingredients for the offence of murder as set out under sections 203 and 206 of the Penal Code must be proved. Section 203 reads – “Any person who with malice aforethought causes death of another person by an unlawful act or omission is guilty of murder”. The prosecution must therefore prove that there was a death that the person who caused such death did so with malice aforethought and that the act or omission leading to the death was unlawful. On the other hand, Section 206 of the Penal Code denies malice aforethought as follows:-

“206 Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances –

(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by in difference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony. ”

21. It is the clear reading of the above section that proof of anyone of the above named circumstances will establish the offence of murder. It now remains to see from the analysis that follows whether the prosecution has measured up to its onerous task.

Analysis and Determination

22. As is clear from the evidence on record there was no eye witness in this case. Even Josephat in whose home compound the deceased fell was not an eye witness. He only recognized the deceased's voice as he came into the compound uttering obscenities. The evidence that is available is that of a dying declaration. According to Patrick and Emmah the deceased rendered the names of the two accused as two of the four people who had assaulted him. Patrick told the court, “He had been cut on the head. Our father said that he met 4 people but identified two that is Fredrick Indeche and Shikoli” The witness identified the 1st accused as Fredrick and the 2nd accused as Shikoli. He added that the deceased and the two accused used to consume chang'aa together.

23. On her part, Emmah stated when she got to where the deceased was lying on the ground in Josephat's home (also known as Maji) the deceased called her when he heard her talking and told her that he would not recover. He also told her that four people had assaulted him by cutting him and that the two accused Fredrick Asamani and Shikoli were among the four people.

24. In considering whether or not the alleged dying declaration is acceptable in this case it is imperative that I consider the evidential value and weight of a dying declaration, and when a court can safely convict on the basis of a dying declaration.

25. A few of the decided cases will shed some light on the evidence of a dying declaration and the matters which this court should consider before concluding that what the deceased told Emmah amounted to a dying declaration. In **Chogo -Vs -Republic** (1985) KLR 1, the three appellants and two other persons were tried for the murder of the deceased who was way laid and shot dead. As the deceased was being taken away from the scene by police he is said to have pointed to the 1st appellant's farm and uttered words which implied or meant that “we have been killed by this rubbish” Two other witnesses testified that the deceased had stated that he had been killed by the former fourth accused who was acquitted. The three appellants appealed. The Court of Appeal held inter alia, that “The general principle on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at the point of death and the mind is induced by the most powerful considerations to tell the truth. In Kenya however the admissibility of a dying declaration does not depend upon the declaration being at the time of making it, in a hopeless expectation of imminent death” It was further held that “there need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in the reception into evidence of such a declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person”.

26. From the above decisions, the Court is expected to exercise caution when the only evidence that is available to base a conviction on is a dying declaration. Secondly the court must ascertain that the dying declaration was made to someone who was at the scene where the declarant made the statement.

27. In the other case of **Ndung'u Vs Republic (1985)KLR 487**, the appellant was tried found guilty and convicted of the offence of murder. Apart from evidence of visual identification one of the witnesses testified that the deceased had stated that the appellant was one of the persons who had attacked him. Even without the benefit of the medical evidence, the appellant was convicted and sentenced to death.

28. On appeal the question was whether the alleged statement by the deceased that it was the appellant who had killed him came within the meaning of section 33 (a) of the Evidence Act, Cap 80, (as amounting to a dying declaration) or not depended on whether the circumstances allegedly mentioned by the deceased resulted in his death ...”.

29. The third case that is relevant to the matter before me is **Aluta vs Republic (1985) KR 543** in which the appellant was charged with the murder of the deceased, one Issa. From the evidence that was before the trial court, Issa had run up to a group of people at his relatives' home with the stab wound that soon afterwards led to his death and called out “Solomon ameniweza”. The appellant denied that he even met the deceased on the material day. He was however found guilty of manslaughter, convicted and sentenced. He appealed.

30. On appeal, it was held, inter alia that “it is generally speaking, unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of the accused and not subject to cross examination, unless there is satisfactory corroboration”, It was also held

that “*The fact that the deceased in his dying declaration said that the appellant killed him was evidence of his belief and not a guarantee of accuracy*”.

31. Finally is the case of **Okethi Okale & others Vs Republic (1965) E.A 555**. The appellants were all convicted of murder. During the trial, the evidence presented to court was from the deceased’s widow as well as evidence of a dying declaration. It transpired that the trial court after discounting the widow’s evidence put forward his own theory which was inconsistent with the widow’s evidence and unsupported by the medical evidence. The judge accepted the deceased’s brother’s evidence as to the dying declaration. It was also clear from the judgment that the judge cast on the appellants the burden of disproving the prosecution case or raising doubts about it. On appeal, it was held, inter alia that “*the trial judge had failed to approach the evidence of a dying declaration with the necessary circumspection.*”

32. The necessary circumspection to be observed by the court is what was set out in the **change** case (above).

33. With the above principles in mind, I will take a walk back into the evidence in this case since the prosecution’s case rests almost entirely on the evidence of the dying declaration. The attack on the deceased in this case appears (I say appears because there was no eye witness) to have taken place between 7.00 pm when the deceased left home telling Emmah that he was going to meet his friends and 8.00 pm when Josephat arrived at the home of the deceased to report to the deceased’s family that the deceased was lying in Josephat’s compound injured and bleeding. No one saw anybody assaulting the deceased but during his testimony, Patrick stated and that the deceased had told both Patrick and Emmah. That the two accused were among the four people who had assaulted and cut him. Emmah also testified that when the deceased heard her voice, he called her by name and that he would not recover. Fredrick Asamani and Shikoli were the two assailants he could identify.

34. An issue arose both during cross examination and defence submissions as to why Josephat never heard the allegation by the deceased that the two accused were among the four people who had assaulted him. To this Emmah replied “At that time (of uttering the dying declaration) Josephat Maji and Patrick had gone to look for a wheelbarrow. The 1st accused is Fredrick Asamani also known as Fred Asamani and Shikoli Mbehelo “In further cross examination, Emmah stated: “My husband told me that the persons who attacked him were Fred Asamani and Shikoli Mbehelo. My husband said that he was attacked by Fred and Shikoli. Shikoli is a common name. I told the police that one of the persons who attacked my husband was Shikoli Mbehelo. I know the 2nd accused’s name.” In re – examination Emmah also stated,” I know the 1st accused as Fred and the 2nd accused as Shikoli. I have known them since they were children.”

35. Although both Emmah and Patrick testified of the dying declaration, the testimony of Emmah shows that at the time the deceased was uttering the dying declaration, both Patrick and Josephat had gone to look for a wheelbarrow. That explains why, if the dying declaration was uttered at all Josephat did not hear it. This then leaves only the evidence of Emmah to support the dying declaration. It is that evidence sufficient to support a conviction?

36. In my considered view, there was need for corroboration of that evidence. This corroboration could have come from the DNA analysis, but the evidence by the government chemist exonerated the two accused whose blood stained clothes and their own blood were taken for analysis. This lack of corroboration leaves some doubt in my mind. If there had been the slightest indication from the DNA analysis, even if it was only the blood of the deceased being found on the panga, the fate of the accused would have been sealed.

37. As things stand now, and though I do not believe the alibi defences of the two accused, it would be dangerous for me to convict either of the accused on the basis of evidence of the dying declaration.

Conclusion

38. In conclusion, I find the two accused herein NOT guilty of the murder of Francis Ashiono Shiroko which murder occurred on 16th February, 2014. They are each acquitted under the provisions of Section 322(1) of the Criminal Procedure Code.

39. Unless there is another reason in confining either of the accused in custody. They are to be set free forthwith.

It is so ordered.

Judgment delivered, dated and signed in open court at Kakamega this 16th day of April 2018

RUTH .N. SITATI

JUDGE

In the presence of

Mr. Ngetich(present).....for the state

Mr. Nyikuli holding brief for Mr. Onsando....for 1st Accused

Mr. Nyikuli(present).....for 2nd Accused

Polycap Mukabwa.....Court Assistant