



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL (MURDER) CASE NO 22 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

EDWARD OKANGA MALALU.....1ST ACCUSED

MECHAEL MUSANGO.....2ND ACCUSED

J U D G M E N T

Introduction

1. The two accused herein, Edward Okanga Malalu and Michael Musango are charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code, the particulars thereof being that on the 21st day of April, 2013 at Emurembe village within the county of Vihiga jointly with others not before court murdered NJOME OMBAKA.

2. On 7th May, 2013, both accused pleaded not guilty to the charge thereby setting the stage for the hearing of the case. The prosecution called six witnesses in support of the case against the accused.

The Prosecution Case

3. From the six witnesses, the prosecution case is that on the evening of 21st April, 2013 at about 7.00pm, the deceased left his house armed with a panga – PMFI 3- and a torch. He told Miriam Atetwe PW2 that he was going to buy cigarettes, though PW2 (Miriam) testified that it was likely the deceased went to drink. On the morning of 22nd April, 2013, news reached Miriam that the body of the deceased was lying on the nearby foot path with a slit throat as well as a cut at the back of the neck.

4. On that same morning the village elder Tom Lipesa was also informed of the deceased's death. Tom Lipesa testified as PW1 (Tom). Both Tom and Miriam went to the scene at different times and saw the body of the deceased lying across the foot path with cuts on the neck both at the front and at the back. Tom went to Kilingili police station to report the incident and while there Miriam also arrived at the police station with a similar report.

5. Chief Inspector Isaac Serem, PW5 the Officer Commanding Station at Kilingili Police Station received that report at about 8.00am on 22nd April, 2013. Chief Inspector Serem together with No. 83891 Corporal Shadrack Sirma, PW6 went to the scene where they saw the body of the deceased.

6. Before the body was taken away Chief Inspector Serem carried out preliminary investigations during which he was informed by both Miriam and Wilson Anabwani, PW3 (Wilson) that the second accused herein had come to the scene and knelt before the body of the deceased asking to be forgiven and trying to put some blood back into the body of the deceased. The first accused had come to the scene earlier. Both were arrested and taken to Kilingili Police Station and placed in cells.

7. It was the testimony of both Chief Inspector Serem and Corporal Sirma that before the second accused was taken to the police station, he was taken to his house and a quick search led to the recovery of a blood stained panga – PMFI – 3 blue shirt, PMFI – 1 Khaki Trouser – PMFI -4 which was also blood stained. Eventually the two accused were charged with the present offence.

8. Margaret Leba, PW4 is the one who identified the body of the deceased for post mortem examination. The prosecution did not call the doctor or any other witness after PW6 had testified. It closed its case at that point.

The Defence Case

9. At the close of the prosecution case, and after due consideration of the evidence on record and submissions made, the accused were put on their defence. Each gave sworn evidence. The first accused gave his name as Edward Amahwa Joseph and not Edward Okanga Malalu. He denied any knowledge of the offence though he knew the deceased who hailed from the same area. The two met frequently.

10. He denied any knowledge of Tom. He also testified that he was a teetotaler. Regarding Tom's testimony, the first accused testified during cross examination that Tom had grudges with everybody and was fond of arresting people for no good reason. He said he had a grudge with Tom because of a debt Tom owed him.

11. The second accused who gave his full name as Michael Musango Abukutsa testified as DW2 and equally denied any involvement in the death of the deceased. He testified that he was arrested on the morning of 22nd April, 2013 when he stopped to see the body of the deceased on his way to the shops. It was also DW2's evidence that the body of the deceased lay about 300 metres from his (2nd Accused's) home.

12. During cross examination, second accused admitted that the deceased was his friend, but denied that they were together on the night before the deceased's body was found lying on a footpath on the morning of 22nd April, 2013. He also denied allegations that he was seen kneeling beside the body of the deceased as he mourned and asked for forgiveness from the deceased. The second accused also denied any knowledge of the various items that were marked for identification and allegedly found in his house. He also testified he had a grudge with Miriam over a 200/- debt. None of the two accused called any witnesses

Issues for Determination

13. In this case, the prosecution is under a duty to prove that the deceased died and to prove the cause of that death. The prosecution also must to prove that the deceased's death was caused by the unlawful act or omission on the part of either both or one of the accused. Finally the prosecution must prove that he accused killed the deceased with malice aforethought as defined under Section 206 of the Penal Code.

14. Before I proceed to analyse the evidence and make a determination of the above issues, I must state at the outset that there was no eye witness to the events that led to the death of the deceased. The only available evidence, although very remotely so, is circumstantial evidence. Secondly no medical evidence was adduced by the prosecution. In **Ndungu-vs- Republic [1985]KLR 497**, the appellant was convicted by the High Court without the benefit of any medical evidence. On appeal, the Court of Appeal held that "*though there are cases in which death can be established without medical evidence relating to its cause, as where there are obvious and grave injuries medical evidence should still be adduced in such cases of the effect of such injuries as opinion expert evidence and as evidence supporting the cause of death alleged by the prosecution.*"

Analysis and Determination

15. The circumstantial evidence on which the prosecution sought to fix the two accused in this case is that on the evening of 21st April, 2013, the accused left his home at about 7.00pm armed with a panga and a torch, and that he had left in the company of the two accused and three other persons whose names were given by PW5 in his evidence in cross examination only and not in his evidence in chief, though PW5 indicated he had recorded the names in the OB. The OB was not produced as part of the Prosecution evidence. According to PW5, it was Miriam who informed him that the deceased had left in the company of the two accused and three other persons.

16. When Miriam gave her testimony both in evidence in chief and on cross examination, she mentioned nothing about the deceased leaving the home in the company of the two accused and others. That circumstantial evidence is therefore too weak to connect the two accused to the death of the deceased.

17. Further the lack of medical evidence, including evidence of analysis of the items PMFI 1 – 4 threw the prosecution's case in even greater peril. It is a pity that the deceased died such a horrible death but the prosecution needed to do more than what it did in establishing the persons behind the death of the deceased. The burden of proof in criminal cases never shifts from the prosecution. It was therefore not the duty of the accused herein to exonerate themselves from the allegations. They could have chosen to say nothing in response to the allegations. The result in my view would have been the same that the prosecution evidence herein was too weak to support the case against the accused.

Conclusion

18. In view of the above, I find and hold that the prosecution has failed to prove its case against the two accused beyond reasonable doubt. The conclusion I have reached is that neither accused is guilty of the murder of NJOMO OMBAKA and I acquit each of them under the provision of section 322(1) of the Criminal Procedure Code.

19. Unless any of them is otherwise lawfully held, they are to be released from prison custody forthwith.

It is so ordered

Judgment delivered, dated and signed in open court at Kakamega this 11th day of April, 2018

RUTH N. SITATI

JUDGE

In the presence of;-

.....Mr. Ngetich.....for state

.....Miss Maluni.....for both accused persons

.....Polycap Mukabwa.....Court assistant