



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL (MURDER) CASE NO. 15 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

JAMES OGWANG ALICHO.....1ST ACCUSED

EZEKIEL AKHERE ANDAYI.....2ND ACCUSED

J U D G M E N T

Introduction

1. The two accused, James Ogwang Alicho and Ezekiel Akhere Andayi are charged with murder contrary to Section 203 as read with Section 204 of the Penal Code, Cap 63 of the Laws of Kenya. The particulars of the offence are that on the night of 3rd and 4th March, 2013, at [an] unknown time in Eshiranda Village, Kisa North Location Khwisero District within Kakamega County, jointly with others not before court murdered LIVINGSTON AMBOLOLA SHILIEBO. They denied committing the offence. The case has been ongoing since the taking of plea in the consolidated cases on 26th March, 2014. Initially the two accused were charged separately in criminal case Nos 15 of 2013 (Republic –vs – James Ogwang Alicho) and 21 of 2013 (Republic – vs – Ezekiel Akheere Andayi).

The Prosecution Case

2. From the six witnesses who testified for the prosecution, the prosecution case is as follows;- At around midnight on 3rd March, 2013, which was the eve of the 2013 general elections in Kenya, Evans Omukala Mukisa (Evans) was in his house at Shirandu Village when he heard noises coming from the road which passed close to his house. Remembering what the two accused had told him during the day, Evans who testified as PW5 suspected that the two accused were part of the mob making the noise. Evans stated that the two accused had told him during the day that they were going to punish the deceased herein in revenge for the assault visited upon their brother Stephen Akhere by the deceased.

3. On hearing the screams, Evans rushed out of his house to the scene where he found the deceased being assaulted by a group of people, among them the two accused. According to Evans, the first accused was armed with a rungu while the second accused was armed with a panga. Evans pleaded with the accused and others to stop assaulting the deceased. They heeded the plea and left the scene but the deceased was so badly beaten that he could not even talk.

4. The matter was reported to the police as good Samaritans using a vehicle offered by John Amwayi Andayi, PW2 (John) took the deceased to hospital. The deceased died the same night and on the following morning Richard Asembo Okiya, PW4 (Richard) who was the local village elder learnt of the death of the deceased at about 6.00am of on 4th March, 2013. On that same day, Richard with the help of Vincent Andayi Mukisa, PW1 (Vincent) Managed to apprehend the first accused herein. He handed him over to the police of Khwisero Police Station. It is not clear from the evidence how the second accused herein was arrested.

5. The prosecution closed its case without the evidence of the doctor who conducted the post mortem examination. The investigating officer did not also testify, but after considering the evidence on record, this court found that the two accused had a case to answer and put them on their defence. Each accused elected to give sworn evidence, but called no witnesses.

The Defence Case

6. James Ogwang' Alicho testified as DW1. He denied committing the offence and put up a defence of alibi. He stated that he was in Kakamega town on the night of the alleged offence and only travelled to his home on the morning of 4th March, 2013 so that he could vote. He was then arrested soon after he arrived at his home and taken to Khwisero Police Station and placed in cells. He was subsequently

charged with the offence of murder which he denied.

7. The second accused, Ezekiel Akhere Andayi testified as DW2. He also gave sworn evidence and denied the charge. He gave defence of alibi saying on the night of the alleged attack, he was in Kakamega town and only went to his home on 7th March, 2013. At his home. He found the entire homestead razed to the ground on allegations that the owners of the homestead had murdered the deceased. He then made his way to Khwisero Police station where he found his co-accused. Then on 18th April, 2013, he was arrested from Maraba Estate in Kakamega town and taken to Kakamega Police Station on suspected offence of sodomy. Later he was charged with murder. He urged the court to acquit him since none of the prosecution witnesses had singled him out as one of the perpetrators of the heinous crime against the deceased.

The issues for Determination

8. The issues for determination in this matter revolve around the provisions of sections 203 and 206 of the Penal Code. Section 203 which defines the offence of murder requires proof of the following if the offence of murder is to be established:-

- *malice aforethought on the part of the accused*
- *death of the deceased*
- *the cause of the death*
- *an unlawful act or omission on the part of the accused resulting in the death of the deceased*

9. Section 206 of the Penal Code on the other hand defines malice aforethought in the following terms:-

‘206.Malice aforethought shall be deemed to be established by evidence proving anyone 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 indifference 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.”*

10. Another issue which has to be determined in this case is that of identification. It is particularly important because the death of the deceased occurred in the night. The courts have held, and rightly so, that in a case where the evidence for the prosecution rests on the identification of the assailant by whatever number of witnesses be it by way of identification of a stranger” or the recognition of a close relative or friend, the court must be careful to properly direct its mind to the condition prevailing at the time of the identification. The court must also consider the length of time for which the witness had the accused under his/her eye. The purpose of this careful consideration is to eliminate the possibility of error which is bound to happen even in cases where the person under observation is a close friend or relative. See **Joseph Ngumbao Nzaro – vs – Republic [1991]2KAR 212**

11. It is also important to note that in a case where a question touching on the identity of an accused arises the court ought to consider whether a description of the accused was given with the first report to any person in authority such as a police officer or even a member of the local administration. Where description of the accused is given, the evidence of both the given and the recipient of the description must testify so as to seal any gaps in the identification evidence. For this proposition see the case of **Simiyu & another – vs – Republic [2005] I KLR 193**.

12. Another issue that is apparent from the evidence on record revolves around the allegation that the deceased mentioned the people who had killed him before he died. In other words, the prosecution sought to rely on the evidence of a dying declaration. The principles governing dying declarations are now well established. In **Republic – vs – Pattni [2005] I KLR 310**, the court held, inter alia, that “ *a dying declaration, in order to be accepted as evidence, must have been made by the deceased at the time the attack leading to his death was carried outand the statements needed to be words by the deceased to the effect that the accused or someone else was killing him.*” In this case, the court will be careful to establish whether indeed the words allegedly spoken by the deceased before he died amounted to a dying declaration.

13. Another issue which this court has to determine is the alibi defence raised by each of the two accused. In **Karanja – vs – Republic [1983] KLR 501**, it was held that “ *in a proper case, the court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused’s guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence, or his alibi, if it amounts thereto, at an early stage in the case and so that it can be tested by those responsible for investigation and prevent any suggestion that the defence was an afterthought”*

14. There is also the issue of how the two accused were arrested. Has the prosecution put forward sufficient evidence to show how each of

the two accused was arrested and how they ended up being charged with the present offence?

Analysis and Determination

15. With the above principles in mind, I now proceed to determine whether the prosecution has proved its case against the two accused beyond all reasonable doubt, the first issue being whether the ingredients of the offence of murder as set out under Section 203 of the Penal Code have been proved. I find that the prosecution has not proved the ingredients of the offence of murder as set out under Sections 203 and 206 of the Penal code. Although all the six witnesses confirmed that the deceased died there is no medical evidence on record to confirm the fact and cause of death. The doctor who performed the post mortem examination on the body of the deceased was not called to testify and therefore it cannot be concluded that the deceased died from the injuries inflicted upon him, during the night of the attack.

16. The prosecution also failed to adduce evidence pinning down the two accused as the persons who killed the deceased in circumstances covered by Section 206 of the Penal Code. Whereas Evans alleged that he was in the company of Vincent when he (Evans) witnessed the deceased being assaulted by the two accused among other people, Vincent testified that his only role in this case was identification of the body of the deceased for post mortem examination. Even PW6 Nicodymus Ongweni Manani (Manani) who alleged during his evidence in chief that he saw the two accused assaulting the deceased could not withstand the pressure of cross examination. He had to admit that he could not say who assaulted the deceased.

17. In effect, the conditions for identifying the two accused on the night in question were extremely difficult. Granted that most of the people at the scene were relatives, it is not remote that there was bound to be confusion as to who was who and was doing what on that dark night. Despite allegations that there was a lamp being used to assist the two accused hit the deceased, I find that the witnesses did not clearly and positively identify the two accused, although I am of the view that the two accused were in the crowd of people who assaulted the deceased, but that is as far as it can go.

18. It was Manani who told the court that the deceased made a dying declaration to the effect that Ongwang Andayi Ongweni and Meta had killed him but when he was put under cross examination he stated that the deceased only said, "They have killed me." In my considered view there was no dying declaration because the words "they have killed me" do not meet the threshold of a dying declaration, since the deceased never gave names of the "they have killed me"

19. There are two final issues I must now deal with. The first of the two is the alibi defence raised by the accused. My humble view is that these alibi defences were mere afterthoughts on the part of each accused. First they never raised the same early enough during the hearing of the case. None of the questions put to the witnesses during cross examination suggested that the accused were not present at the scene. Their defences must have even taken their counsel by surprise. If the prosecution had done a better job in presenting the evidence, these alibi defences would have had little impact on the case for the prosecution.

20. The second of the two issues concerns the arrest of the two accused. No police officer came to court to say how the two accused were arrested and how the decision to charge them was arrived at, In **Republic-vs -Pattni** (Supra) the court held that "*The only inference that could be made from the failure by the prosecution to adduce evidence surrounding the arrest of the accused and his subsequent release had to be that such evidence would have adversely affected the prosecution case. There was a serious doubt as to whether the accused had opportunity to commit the offence charged.*" In the instant case, the non –availability of police evidence brings to mind a serious question of fact whether the two accused had the opportunity to commit the offence with which they are charged.

Conclusion

21. Having made the above findings, I have no choice but to conclude that the two accused are not guilty of the murder of Livingston Ambolola Shiliebo and to acquit each one of them accordingly under section 322(1) of the Criminal Procedure Code. Unless there is any other reason to hold the accused in custody, they are to be released therefrom forthwith.

It is so ordered

Judgment delivered dated and signed in open court at Kakamega on this 11TH day of APRIL 2018

RUTH N. SITATI

JUDGE

In the presence of

Mr. Ngetich (present).....for State

Miss Maluni for Atulo (present).....for both accused

Polycap Mukabwa.....Court Assistant