



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL CASE NO 5 OF 2014

REPUBLIC

VERSUS

MWANYIKA MBELE 1ST ACCUSED PERSON

SADI MWAKE 2ND ACCUSED PERSON

JUDGMENT

INTRODUCTION

1. The Accused persons herein, Mwanyika Mbele alias Hamisi and Sadi Mwake, were 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 charge were that on 22nd April 2015 at Buguta Village within Voi sub-county in Taita Taveta County, they jointly murdered Julius Mwalimu Mbele (hereinafter referred to as “the deceased”).
2. On 1st December 2015, the Prosecution filed a Notice of Discontinuance dated 24th November 2015 withdrawing charges against the Amina Ruwa and Stephen Mwanyala (hereinafter referred to as “the Accused person’s Co-Accused) who were initially the 3rd and 4th Accused persons in the matter herein. This court granted the Prosecution leave to withdraw the said charges as the same was in accordance with Article 157 (6)(c) of the Constitution of Kenya, 2010.
3. After considering the evidence and the Accused persons and the Prosecution’s Written Submissions on the question of whether or not they had a case to answer, on 3rd May 2017, this court found that a *prima facie* case had been established against him and put on his defence. His case was heard on 24th October 2017.

THE PROSECUTION’S CASE

4. The Prosecution called a total of twelve (12) witnesses to demonstrate the following ingredients of murder outlined in Section 203 of the Penal Code:-

- 1. Proof of the fact and cause of death of the deceased;**
- 2. Proof that the deceased met his death as the result of an unlawful act or omission on the part of the accused persons; and**
- 3. Proof that the said unlawful act or omission was committed with malice aforethought.**

5. The Prosecution’s case was that the Accused persons who were the deceased’s relatives had an existing grudge with the deceased following disputes relating to sub-division of family land. On the material night of 21st April 2015, the deceased his wife, Clemence Mwanyumba (hereinafter referred to PW 1) were asleep in their house when a person wearing a hood broke into their house and shone light from a torch on their faces. He then started attacking the deceased with a panga. The attacker also cut PW 1 on her hand with the panga as she tried to grab him whereafter he fled. Her screams attracted her daughter in-law and neighbours who came to their assistance. The deceased died during the attack. He sustained cut wounds on his neck, stomach, shoulder and fingers. PW 1 did not see the face of her attackers because the light from the torch blinded her.

6. The Prosecution contended that the Accused persons suspected that the deceased had bewitched them and that this may have motivated them to kill him. It submitted that both Accused persons were guilty of the offence of murder and urged this court to convict them accordingly.

THE ACCUSED PERSONS’ CASE

7. The Accused persons' case was that neither PW 1 nor the neighbours who responded to her distress call identified or arrested the attackers. They pointed out that despite the Prosecution having withdrawn the cases against their Co-Accused persons so that they could be turned into Prosecution's witnesses, they were both not called to testify against them.

8. The 1st Accused person stated that he moved out from Buguta in 1989 and eventually settled in Malindi in 1991. He stated that because he had no land in Buguta, he would never have been involved in the deceased's death in 2015.

9. The 2nd Accused person denied ever having met the 1st Accused person or giving police officers the information that was recorded in his Statement of Inquiry dated 26th April 2015. He contended that he signed the said statement under duress and coercion after being beaten by police officers..

10. It was their averment that the Prosecution's case was based on circumstantial evidence and that bearing in mind the evidence that was tendered in court, it had failed to prove its case against them to the standard set by the law.

LEGAL ANALYSIS

11. PW 1 testified that a dispute relating to ancestral land arose between the deceased and his relatives, which the 2nd Accused person became involved in after his father died. He stated that the 2nd Accused person chased the deceased and his family from his funeral meetings. They were banned from attending the 2nd Accused person's father's funeral ostensibly on his instructions when he was alive as he had accused the deceased of practicing witchcraft against him

12. He told this court that at one point the accusations of the witchcraft by the deceased were discussed at the Chief's place and at the time, the 1st Accused person refused to greet the deceased. The deceased was ordered to pay a fine of Kshs 32,000/=, which one Mshangae Mwake who was said to have been bewitched, refused to take on account of it having been little. By the time the deceased died, he had not paid the said Mshangae Mwake the fine.

13. No 80076683 Senior Sergeant Samuel Ngalla (hereinafter referred to as "PW 2") confirmed having gone to the Chief's office during the witchcraft dispute between the said Mshangae Mwake and the deceased.

14. Shadrack Mbele Mwalimu (hereinafter referred to as "PW 3") was the deceased's son. He testified that the 1st Accused person was his father's brother while the 2nd Accused person's father and his father were cousins. He testified that although the relationship between the 2nd Accused person's father and the deceased was bad, he could not say the same of the 1st Accused person's relationship with the deceased.

15. Michael Mwanguo Mwalimu (hereinafter referred to as "PW 4") was also the deceased's son. He talked of the relationship between the 1st Accused person deteriorating after the 2nd Accused person's father died in 2013. He stated that before he left for Mombasa in 2002, the 2nd Accused person's father and the deceased relationship was good. He stated that he attended the 2nd Accused person's father's funeral although the deceased was barred from attending the same. He said that he last saw the 1st Accused person in Buguta about 2011 -2012 when he had come to visit but that he ever visited their home.

16. Mungwana Mbeze Mbeke (hereinafter referred to as "PW 5") was the deceased's younger brother. He corroborated PW 1's, PW 2's, PW 3's and PW 4's evidence that there existed a dispute between the 2nd Accused person's father and the deceased relating to the ancestral land. He testified of the calls the 1st Accused person would make to him and the deceased insulting them and calling the deceased "dog, hyena". He also told this court how Amina Phali Ruwa called him and told him that the deceased would not enter the house he was constructing.

17. No 238150 APC Joseph Malasi (hereinafter referred to as "PW 6") was the friend to the 2nd Accused person. He translated the text message that was sent from the 2nd Accused person's phone to Amina Phali Ruwa's phone from Taita language to Kiswahili as follows:- **"Nimeuliza Babangu huyo wa Malindi amekuja hapa nikakuta amemaliza kazi na amepata unga wa kuenda kumaliza mambo na umwambie asiende kuongea na kumaliza kwa simu"** loosely translated in English as **"I have asked my father from Malindi he found he had finished the work and got flour and tell him not to talk or finish on phone."** (sic)

18. He testified that Amina Phali Ruwa confirmed that the text message related to the deceased's death and that on interviewing the 2nd Accused person, he confirmed that the 1st Accused person was the one who killed the deceased. He confirmed having been present when the 2nd Accused person, who requested him to be a witness signed the Statement of Inquiry that was recorded by No 216534 Chief Inspector Michael Mureithi (hereinafter referred to as "PW 9"). He confirmed the 2nd Accused person having read through the Statement of Inquiry before signing the same and that he was never coerced to sign the said Statement of Inquiry which was adduced in evidence and marked as Exhibit "4".

19. Dr Peris Wairimu Ngugi (hereinafter referred to as "PW 7") adduced in evidence the Postmortem Report dated 22nd April 2015 that was conducted by Dr Lucas. The deceased's body had several cut wounds. The doctor's opinion was that the cause of the deceased's death was cardio-respiratory arrest due to severe penetrating trauma to the posterior neck with cord transections.

20. No 61751 Sergeant David Chege (herein after referred to as "PW 8) was the Scenes of Crimes officer. He adduced in evidence the photographs of the scene of crime showing the deceased had multiple cut wounds on his body.

21. PW 9 confirmed that the 2nd Accused person voluntarily signed his Statement of Inquiry to the effect that on the material night, the 1st Accused person went to his house and asked for a cup of water. He was armed with a panga at the time. He told him, **"Dadi, naenda kwa**

ndungu yangu na ninaenda kuua” translated in English as **“Daddy, I am going to my brother and I am going to kill.”** Shortly thereafter, he heard people scream but he was scared of coming out because the 1st Accused person had threatened him with death.

22. No 70455 Corporal Faisal Jama (hereinafter referred to as PW 10”) had authority to extract data and mpesa details from the Safaricom system. He testified that he received three (3) mobile numbers namely 0718-164862, 0723-948302 and 0725-159766 belonging to the 1st Accused person, Amina Phali Ruwa and the 2nd Accused person respectively with instructions to extract data from the three (3) mobile numbers for the period from 15th April 2015 to 24th April 2015.

23. From his investigations, he established that on 21st April 2015 from 1545 hours upto 1550hours, there was communication between the 1st and 2nd Accused persons. They also communicated on the same date between 1815 hours to 1817 hours. On the same date at 1817 hours, the 2nd Accused person sent a text message to Amina Phali Ruwa which she received at 1832 hours.

24. His evidence was that he complied with the strict provisions of the law in retrieving the data from the three (3) mobile numbers which was obtained from a computer that was secured by a password.

25. No 100304 PC Joan Wanjiru Karanja (hereinafter referred to as “PW 11”) was the Investigation Officer in the case herein. She reiterated the evidence that was adduced by the Prosecution witnesses and gave a detailed account of how the 2nd Accused person was arrested at Malindi with the help of Amina Phali Ruwa.

26. No 236157 Inspector John Mutinda Nyamai (hereinafter referred to as “PW 12”) confirmed that the IMEI Numbers of the mobile phone that were recovered paired with the Safaricom Serial Numbers and that he extracted the data of the text messages that were exchanged in Taita language, a language he could not understand.

27. The offence of murder is defined as follows by section 203 of the Penal Code:-

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

28. This definition gives rise to four (4) crucial ingredients of the offence of murder all four of which the prosecution must prove beyond a reasonable doubt in order to prove the charge. These are:

i. The fact of the death of the deceased.

ii. The cause of such death.

iii. Proof that the deceased met his death as a result of an unlawful act or omission on the part of the Accused persons,

iv. Proof that said unlawful act or omission was committed with malice aforethought.

29. Malice aforethought is defined in Section 206 as follows:-

“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 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 act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony”.

30. In the case of **Libambula vs Republic (2003) KLR 683**, the Court of Appeal stated:-

“We may pose, what is the relevance of motive here? Motive is that which makes a man do a particular act in a particular way. A motive exists for every voluntary act and is often proved by the conduct of a person. See Section 8 of Evidence Act Cap 80 Laws of Kenya.

Motive becomes an important element in the chain of presumptive proof and where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof if it is not essential to prove a crime.”

31. To prove a case based on circumstantial evidence, the Prosecution was therefore required to satisfy the test that a negative inference against the Accused person as was set out in the case of **Musoke Vs. R (1958) EA 175** where the court cited with the approval the decision

in Teper Vs. R (1952) ALL 480 where it was held as follows;

“It is also necessary before drawing the inference of accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”

32. It is true that the case herein was based on circumstantial evidence because no one witnessed the 1st and 2nd Accused person’s kill the deceased. Further, as was held in the case of Republic vs Kipkering Arap Koske & another (1949) 16 at page 135, the Court of Appeal held that:- **“in order to justify on circumstantial evidence....any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused”**

33. Indeed as was also held in the case of Mwangi vs Republic (1983) KLR 75, the Court of Appeal also held that in a case depending exclusively on circumstantial evidence, there must be no other existing circumstances which would weaken the chain of circumstances.

34. After perusing the evidence that was tendered in court, it was clear that there was a dispute between the 2nd Accused person’s family and the deceased and that the 1st Accused person’s relationship with the deceased deteriorated after the death of the 2nd Accused person’s father’s death in 2013.

35. The 1st Accused person was not truthful when he testified that he had never gone back in Buguta since 1989 because PW 1 testified that he was present at the Chief’s office when the deceased had been accused of practicing witchcraft again Mshangae Mwake.

36. The 1st and 2nd Accused persons were also not truthful that they had no contact since 1989 when the 1st Accused person left Buguta and eventually settled in Malindi. This is because the evidence of PW 10 and PW 12 showed that on the material date the two (2) Accused persons were in communication with each other and the fact that the 2nd Accused person sent a text message to his Co-Accused Amina Phali Ruwa.

37. Going further, whereas the Accused persons submitted that there was no confession by the 2nd Accused person implicating the 1st Accused person herein, this was negated by the fact that data showed that they were both in communication with each other on the same date the deceased was killed. The 2nd Accused person’s assertions that he was coerced into signing the Statement of Inquiry was not demonstrated as he did not inform the court of the alleged torture. He appeared to blame the court and police officers to extricate himself from the contents therein. His assertions that he was coerced into signing the said Statement of Inquiry was negated by the fact that he communicated with the 1st Accused Person on 21st April 2015. There could have been no clearer evidence showing their involvement in the deceased’s death.

38. The burden had shifted to them in line with Section 111 (1) of the Evidence Act Cap 80 Laws of Kenya to explain why they had communicated with each other when they had each testified that they had no earlier communication.

Section 111(1) of the Evidence Act provides as follows:-

“When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence...”

39. Accordingly, having considered the evidence that was adduced by the Prosecution witnesses and that of the Accused Persons, their respective Written Submissions and the case law they relied upon, this court came to the firm conclusion that the Prosecution proved its case to the required standard in criminal case, being proof of the case beyond reasonable doubt by demonstrating that the deceased met her death as a result of unlawful actions or omissions on the part of the Accused persons and that the unlawful acts or omissions were committed with malice aforethought on his part.

40. The Accused persons did not adduce any oral or documentary evidence or co-existing circumstances that weakened or destroyed the Prosecution case. In fact, they did not demonstrate that there was any existing grudge between him and the deceased person that would have persuaded this court to conclude that he had been framed for having caused the deceased’s death.

DISPOSITION

41. For the foregoing reasons, the Accused persons are hereby found guilty of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code and this court hereby convict them accordingly.

It is so ordered.

DATED at NAIROBI this 25th day of May 2018

J. KAMAU

JUDGE

READ, DELIVERED and SIGNED at VOI this 30th day of May 2018

F. AMIN

JUDGE

In the presence of:-

Mr Mwinzi for Accused

Miss Anyumba for State

Josephat Mavu- Court Clerk