



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI
CRIMINAL CASE NO 13 OF 2014

REPUBLIC

VERSUS

DAVID MATATA KITEME

JUDGMENT

INTRODUCTION

1. The Accused person herein, David Matata Kiteme, was 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 the night of 21st/22nd May 2014 at Mtakuja Village in Taveta Sub-County within Taita Taveta County, he murdered Bahati John (hereinafter referred to as “the deceased”).

2. After considering the evidence and his and the Prosecution’s Written Submissions on the question of whether or not he had a case to answer, on 31st July 2017, this court found that a *prima facie* case had been established against him and put on his defence. His case was heard on 17th October 2017.

THE PROSECUTION’S CASE

3. The Prosecution called a total of seven (8) 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.**

4. It also submitted that in addition to the above principles, the court must also consider a further principle 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.”

5. It pointed out that Dr Duncan Amani Chai (hereinafter referred to as “PW 4”) testified that the death of the deceased was a result of serious head injury and that the conclusion in the Postmortem Report was that the deceased’s death was not due to natural causes.

6. It stated that Martha Mwangeli (hereinafter referred to as “PW 1”) was the only witness who testified that the Accused person hit the deceased after he came home drunk. It added that although the Accused person had contended that he had hit the deceased with a small stick, PW 1 testified that the Accused repeatedly hit the deceased and even chased her out of the house. It also contended that there was no evidence to show that the deceased was epileptic.

7. It averred that the Accused person had admitted that he was the one who disciplined the deceased and from PW 1’s evidence, he was angry with him and thus committed the offence with malice aforethought. It submitted that from the totality of the evidence, it had proved that the Accused unlawfully caused the death of the deceased.

THE ACCUSED PERSONS CASE

8. The Accused person adduced sworn testimony and denied ever having committed the offence or having had malice aforethought as had been submitted by the Prosecution, which he said it had failed to prove.

9. He contended that the deceased injured herself as she struggled during a seizure following an epileptic attack which he said was prevalent in their family. He was categorical that PW 2 testified that the deceased had burns on her back which was indicative of behavior of an epileptic patient.

10. He also pointed out that PW 1 was the only eye witness who connected him to the deceased's death and because she had contended that he used a small stick to hit the deceased, such a stick could not have caused the head injury PW 4 had opined was the cause of the deceased's death.

11. He thus urged this court to acquit him of the offence of murder under Section 215 of the Criminal Procedure Code Cap 75 (Laws of Kenya).

LEGAL ANALYSIS

12. The Accused was PW 1's son. The deceased, whose mother was also deceased, was her grandson. She testified that on the evening of the material day, the Accused came and found her cooking and started talking to the deceased. He told the deceased that he had never seen a cripple who was a thief and started beating him with a big stick. She asked him to stop beating him. He then asked her to go and buy fish and when she refused, he hit her with a belt. She ran to the shamba screaming where she hid until the following morning.

13. When she returned home, she found the deceased lying on the ground groaning. She went and informed her daughter, Mueni, of what had transpired. Having succumbed to his injuries, the police came and took the deceased's body to the mortuary. The Accused person had already escaped by this time.

14. During her Cross-examination, she told the court that the Accused person was her youngest son and that she had never seen him beat the deceased before. She further stated that the Accused person was drunk at the material time and that she asked him not to beat the deceased with a big stick. In her Re-examination, she stated that the Accused person hit the deceased with a small stick and she would not have known if he hit the deceased on the head.

15. Rebecca Mueni Matheka (hereinafter referred to as PW 2) who was an in law to the Accused person, told the court that on 22nd May 2014 at about 6.00 am, her mother, Agnes Mwanze Matheka, came and told her that PW 1 had informed her that the deceased had been seriously wounded. They went to the scene where they found the deceased with a smashed head with injuries to the eye and burn wounds on the back. At the time, the deceased was alive and he told them that he had been beaten by the Accused person. They later learnt from PW 1 that the deceased later died.

16. John Komo Musyoka (hereinafter referred to as "PW 3") testified that the deceased was his cousin's child and that he had known him since he was a small child. He confirmed that the deceased used to live with PW 1. He was a witness at the time the Post Mortem examination was being conducted at Taveta Hospital. He admitted that he never saw the Accused person beat the deceased.

17. Dr Duncan Amani Chai (hereinafter referred to as "PW 4") conducted the Post mortem examination on the deceased on 29th May 2014 at 2.15pm. He observed that the deceased was aged seventeen (17) years and had deformity of both hands and legs which were crippled. He stated that the bruises on the back and neck were frictional injuries which were an indication that the deceased may have been dragged on a surface or struggled to free himself. Internal examination showed that the deceased had bleeding on the scalp. He concluded that the cause of the deceased's death was intracranial bleeding due to blunt object head injury.

18. Japheth Mutuku (hereinafter referred to as "PW 5") told the court that the Accused person was traced at a house in his Village whereafter he was arrested and taken to Taveta Police Station. He stated that when they interrogated the Accused person, he informed him that he was staying with a friend and that he was not hiding.

19. No 81536 Corporal Judith Kimungu (hereinafter referred to as "PW 6") was the Investigation Officer. She reiterated the evidence of the Prosecution witnesses. She said that she took photographs of the deceased's body and after she downloaded the same from her camera, she handed to the Scenes of Crime Officer, a CD containing photos for processing. No 93081 PC Shem Asher (hereinafter referred to as "PW 7"), the Scene of Crimes Officer, tendered in evidence several photos that were taken at the scene of the offence.

20. PW 6 stated that she charged the Accused person with the offence of murder because PW 1 witnessed the Accused person scolding and beating the deceased and that it was clear that he was the last person to have been seen with the deceased. She added that when she arrested the Accused person, he told her that he loved the deceased but that he had been possessed by the devil and did not know what happened.

21. In his sworn testimony, the Accused person confirmed that the deceased was his late sister's daughter, Mbithi Kiteme, and that they lived with PW 1. His evidence was that on 21st May 2014, he arrived home at about 7.00 pm and he found PW 1 and the deceased. PW 1 told him that she had cooked vegetables but the deceased ate them. He said that this angered him and he took a cane about one (1) inch thick and three quarters ($\frac{3}{4}$) long and beat the deceased on her shin three (3) times for his bad behaviour. He was emphatic that the deceased was not crippled but walked normally and that he had been suffering from epilepsy since 2002.

22. He stated that after the death of his sister seven (7) years ago, he started taking care of the deceased. He denied that he hit the deceased on the head or inflicted burns on her. He said that when PW 1 asked him to stop beating the deceased, he stopped, went to the shops, bought more vegetables which he took to the house for PW 1 and the deceased to prepare. He said that they ate the food and since he was going back to his farm at Moyo Moyo the following day, he left PW 1 with Kshs 500/= for their upkeep.

23. His evidence was that on 26th May 2014, while he was at his farm in Moyo Moyo, a mob of more than ten (10) people came and beat him. They took him to the Taveta Police Station accusing him of having killed the deceased.

24. During his Cross-examination, he admitted having beaten the deceased but denied that he used to drink alcohol. When he was shown the Mental Status Report dated 3rd June 2014 showing that he had a history of drinking and smoking, he told the court that the doctor was lying. He denied that he was drunk on the material day and that PW 1 was not truthful in her evidence. He was categorical that PW 1 was not only capable of lying but that she actually lied to the court. He testified that he had never had any difference with her and that they lived peacefully.

25. Although he said that Rachel, his biological sister, could confirm that he was in Moyo Moyo in January 2014, he did not call her or any witness to confirm his alibi of the material date or to confirm that the deceased had fallen previously due to epilepsy as this could have assisted him get out of jail.

26. 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.”

27. 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.

28. 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”.

29. 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.”

30. On the fact of the death of the deceased there cannot be any doubt, PW 1, PW 2, PW 3 and PW 4 all confirmed this. Further, the cause of death was confirmed by PW 4 in the Postmortem Report to the effect that the deceased died as a result of intracranial bleeding due to blunt object head injury.

31. The photographs that were produced by PW 7 and Postmortem Report were evidence of a murder most foul perpetrated on a malnourished and disabled (17) year old who was incapable of defending himself or running away.

32. Ingredients (1), (2) and (4) of the offence of murder had been proved herein. What remained for determination was whether the deceased met his death as a result of the Accused person's actions or omissions.

33. The court found the Accused person to have been evasive and accused all Prosecution witnesses including PW 1, who was his mother, of

lying. He denied that the deceased was physically challenged despite testimony from PW 1, PW 2 and PW 3 all of whom not only knew the Accused person and the deceased very well but they were also his relatives. Their testimony was confirmed by a medical doctor, PW 4, in his Postmortem Report that was adduced as evidence in this court, that the deceased was physically challenged.

34. His evidence that the deceased had suffered a total of four (4) epileptic attacks since 2002 was not plausible. Despite there having been an indication of a history of epilepsy in the family in the Psychiatric Evaluation Report that was filed before he pleaded to the charge herein, PW 1 denied that the deceased ever suffered from epilepsy. In addition, in her investigations, PW 6 did not find any evidence that pointed to the deceased having suffered from epilepsy.

35. Further, the injuries the deceased sustained could not have been as a result of an epileptic attack. PW 4 was emphatic that the intracranial bleeding was due to a blunt injury and that the frictional injuries pointed to the deceased having been dragged on a surface. There were also an extensive bruises from the left shoulder to the last rib.

36. Going further, the Accused person's testimony that he never had any difference with PW 1 and that they lived in harmony had to be taken with a pinch of salt. Indeed, PW 1 testified that he beat her and she took off screaming, hiding in her shamba where she slept until morning. Whereas it is not unusual for family members to have disagreements, a mother who she sleeps in her shamba until morning because of fear of her own son was not indicative of peaceful co-existence.

37. As PW 1 ran and hid in her shamba and left the Accused person beating the deceased, she would not have known whether he continued beating the deceased or what weapon he used to beat her. The fact that she found the deceased groaning in the morning with serious injuries from which she succumbed pointed to the fact that the same had been caused by the Accused person herein who was the last person to have been seen with the deceased and beating him. In any event, the deceased told her that it was the Accused who had beaten him.

38. Notably, dying declarations must be treated with abundant caution. Karanja J. in the case of **Republic v Josiah Ocheng Mandere [2016] eKLR**, it was stated as follows:-

“A dying declaration is generally admissible as a matter of necessity. The lapse of time between the declaration and death is immaterial and the presence of the accused at the making of the declaration is unnecessary. However, it would be 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. But, it is not a rule of law that in order to support a conviction, there must be corroboration of a dying declaration (see, Okale Vs. Republic (1965) EA 555).”

39. In this case, the deceased's dying declaration was corroborated by PW 1 and PW 2. Whereas the Prosecution did not adduce in evidence the weapon the Accused person used to beat the deceased, the Accused person described it as one (1) inch thick and three quarters ($\frac{3}{4}$) long. PW 6 described it as “rungu”. As this court did not see the weapon used, it could only infer that the weapon used by the deceased was not a small stick as had been contended by PW 1 and the Accused person due to the type of injuries the deceased suffered.

40. For all the foregoing reasons, it was the finding of this court that the deceased suffered fatal injuries as a direct result of being assaulted by the Accused person who had the intention of killing him. Further, the nature of the injuries was ghastly and shocking, demonstrating the Accused person's intention to kill the deceased.

41. Accordingly, having carefully considered the evidence that was adduced by both the Prosecution and the Accused person, the court found that the Prosecution proved its case to the required standard, which was proof beyond reasonable doubt by demonstrating that the deceased met his death as a result of the unlawful acts or omissions on the part of the Accused person and that the alleged unlawful acts or omissions were committed with malice aforethought on his part.

DISPOSITION

42. For the foregoing reasons, the Accused person is 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 him accordingly.

43. 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:-

Mwinzi holding brief for Muthami advocate for Accused

Miss Anyumba for State

Josephat Mavu– Court Clerk