



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL CASE NO. 50 OF 2009

REPUBLIC.....PROSECUTOR

VERSUS

P M B ALIAS K.....ACCUSED

J U D G M E N T

The Charge

1. The accused herein P M B alias K is charged with murder contrary to section 203 as read with Section 204 of the Penal Code, the particulars thereof being that on the 4th day of August, 2007 in Butere District within Western Province, jointly with others before court, murdered J A O
2. When the accused appeared for plea before Lenaola J (as he then was) on 24th March, 2010, he denied committing the offence. The case was then set down for hearing, and since then the case has been ongoing. It is regrettable that the hearing of this case was not concluded earlier, but finally, the judgment is here.

The Prosecution Case

3. The prosecution called four witnesses from whose testimonies the prosecution tried to prove the charge of murder against the accused. The case for the prosecution briefly was that on the 3rd August, 2007, G A O of Kisa Location left home together with his mother and two sisters for a memorial service for his mother's sister. G A O testified as PW4 (G). Back home, he left his wife J A O and his children. Among the children were J S who testified as PW2 (J) and C O A PW3 (C). At the material time, J was about 7 years old while C was about 15 years old.
4. At about 2.00am on 4th August, 2007, a gang of four people, among them the accused herein forcibly entered Gabriel's house and started to want only cut the deceased on the head and other parts of the body using pangas. The assailants who had torches flushed the deceased from under her bed and cut her, first while she was in her bedroom and later when she had been taken to the sitting room. Both J and C watched as the assailants cut their mother mercilessly all over the body.
5. After accomplishing their mission, the assailants who had not disguised their appearances went away, leaving the deceased in the sitting room bleeding profusely. After the assailants left, C screamed. Neighbours who answered to the screams helped take the deceased first to Mwhila Mission Hospital and later to Kakamega Provincial General Hospital. G was informed of the attack and returned home at around 7.00am on 4th August, 2007 only to find the home teaming with people. By the time he got to see his wife at the hospital, she was already dead. He made arrangements for post mortem examination. The postmortem examination was conducted on 9th August, 2007 by Dr. Oreke at the Kakamega Provincial General Hospital mortuary before the deceased's body was released to G for burial.
6. G testified that when he got home at 7.00am on 4th August, 2007, both J and C gave him names of persons among them the accused, who had mounted the attack on his wife. Three of those mentioned were differently charged, but at the end of it all, they were all acquitted.

The Defence Case

7. At the close of the prosecution case, the accused was placed on his defence. He gave sworn evidence and told the court that he was a resident of Kibera, Nairobi. He denied committing the offence. He stated that on 4th August, 2007 when he is alleged to have committed the

offence, The offence was in Nairobi, though he had been home some two months before the date of the alleged murder for the burial of his child. He produced a bundle of receipts (19 in number) for payment of rent covering the years 2008 and 2009. He stated that all his documents for 2007 were burned during the post-election violence (pev) of 2007/2008.

8. The accused stated further that during his stay in Nairobi, he used to share a house with one A O, the eldest son of the deceased, both before and for about one month after the deceased's death. He also stated that his wife used to stay in the village and that she had a grudge with the deceased's husband.

9. On 29th November, 2009, he was arrested as he returned home from church, on allegations that he had killed the deceased. He denied even having run away from home to hide in Nairobi after the deceased died. He also stated that his younger brother by the name K was arrested in connection with the same offence, but was acquitted. The accused did not call any witnesses.

Issues for determination

10. For the prosecution to prove their case against the accused herein beyond reasonable doubt, the evidence must meet the standard of proof on the following issues:-

- (a) whether the deceased died and what the cause of her death was
- (b) whether it was the accused herein who caused that death through an unlawful act or omission on his part and
- (c) whether in causing the deceased's death, the accused had the requisite malice afore thought.

11. It is to be noted that each of the above ingredients must be determined in favour of the prosecution before a finding of guilty is entered.

Analysis and Determination

12. I shall analyse each issue in turn with a view to establishing whether the prosecution has met the standard of proof of beyond reasonable doubt

(a) Whether the deceased died and the cause of death

13. There is no doubt on this issue that the deceased died. G and his two sons J and C testified to the fact of the deceased's death. G also attended the post mortem examination on the body of the deceased after identifying the body to Dr. Oreke who carried out the post mortem examination. According to G, after the post mortem examination was done, the body of the deceased was released to him for burial.

14. According to Dr. Oreke, the deceased's body which was well preserved was 5'8" long. Externally there were wounds on the forehead, with the one on the right measuring 7cm long. There was also a cut wound on the back of the right wrist with other cuts on either knee which had also cut the tendons below the knees

15. Internally, there was fracture of skull bones of both left and right side, which penetrated the brain, causing bleeding into the brain. In the opinion of Dr. Oreke, the cause of death was severe head injury secondary to penetrating head trauma. The post mortem report dated stamped and signed on 9th August, 2007 containing details of the above described injuries was produced in evidence as PExhibit 1.

16. It is clear to the court that the attack on the deceased was wanton and brutal and as stated by J and C the assailants just started cutting the deceased as soon as they gained entry into the house. The more difficult issue in this case is the following:-

(b) Whether it was the accused who killed the deceased through an unlawful act of commission or omission.

17. All the evidence in this case points to the fact that the incident which led to the death of the deceased took place at about 2.00am on 4th August, 2007. The people who were in the house with the deceased were J, by then aged 7 years and C who was 15 years of age then. These are the two eye witnesses who saw what happened and their evidence must therefore be critically analysed with a view to establishing whether it places the accused at the scene of crime.

18. J testified that at about 2.00am on 4th August, 2007, while he was asleep, he heard a knock at the door of their mud house. One person who identified himself as O asked the deceased to open the door but when the deceased told them that the voice she was hearing was not that of O, the people started breaking the house as the deceased screamed. The deceased's screams notwithstanding, the attackers brought down the door and entered the house. J stated that as soon as the people spoke, the deceased lit the lantern but as soon as the people entered they started cutting the deceased. He said he knew the people, and that one of those people, was the accused whom he knew as K. He also testified that when he asked K why he was cutting the deceased, K turned on him and cut him on the left ear. The court was shown a long scar running from the upper part of the cheek to the upper part of the left ear. It was not clear from the evidence whether J was taken for treatment following that assault since no medical evidence was adduced to support the same.

19. J also testified that when he was cut on the left ear, he had run after his mother who had been taken outside the house by the assailants. J was adamant, that he recognized the accused who is a son to his elder uncle and whose home is only between 50 – 70 metres away from their own house.

20. Regarding the light from the lantern J testified that there was enough light from the lantern which was placed beside the deceased's bed.

21. During cross examination J was shown the statement he recorded with the police and he confirmed that the statement did not contain his name of the accused. In further cross examination, J stated that the assailants kicked the lantern, and put it out before they started cutting the deceased, and that the lantern was in fact off when he was cut on the left ear. J also admitted on further cross examination that his statement to the police did not indicate that it was the accused who cut him on the ear and that he in fact did not give his brother C the names of the assailants. J also conceded the suggestion by defence counsel that the accused has never been charged with having assaulted him (J)

22. Now we move to the evidence of C, C corroborated J's testimony as to how the attackers entered the house. He testified that as soon as the assailants spoke from outside the deceased hit a lantern (a small one) and went to the sitting room but as soon as the assailants entered the house, the deceased ran back to her bedroom where both C and J were sleeping. At this point, C did not say whether or not the deceased took the lantern with her back to the bedroom, but he testified that the lantern was put off sometime after the assailants had entered the house. Both J and C also made a concurrent statement to the effect that none of the assailants uttered any word after that initial voice called from outside saying it was O. According to C, he was able to recognize the assailants with the help of the light from the lantern (Before it was put out) and also with the help of very bright light coming from the attackers torches which they were shining at each other.

23. C was cross examined at length by Mr. Nandwa Advocate who conducted the accused's defence. During the cross examination, C admitted that his statement did not make any reference to J having called the accused by his alias name of K, or that K cut J. He also admitted that his statement did not contain the names of all the five assailants and further that there was no mention of a torch in his statement. C also admitted that he did not give the names of the assailants to his neighbour called Aggrey who was the first person to be informed of the attack. C also testified on cross examination that when the deceased went to the sitting room, she in fact left the lantern in the bedroom.

24. Before I move further into this issue, I will make one comment on the evidence of a first report, whether to person in authority or any other person whom a report of any incident is made in the first instance. The courts have held and I entirely agree with the holding, that the first report is important as it often gives the uncorrupted version of evidence before a witness has had time to consider and reconsider what he should say or not say. On the night in question it would have done the prosecution case much justice if both J and C had given the names of the assailants to Aggrey whom they ran to for help after the assailants left. It would also have been a stronger case if the said Aggrey had been called as a witness.

25. Now back to the evidence of J and C and whether it places the accused at the scene of crime. In my considered view, the evidence does not place the accused at the scene and this is not to say that the accused was not there. He may have been among the attackers, in spite of his alibi defence. First, the evidence of the two witnesses clearly shows that the circumstances for proper recognition of the accused were extremely difficult. The attack was first of all sudden, and secondly it is not clear whether there was light in the room which could have enabled the two pairs of young eyes to recognize the accused who was both a neighbour and a cousin. The evidence regarding the light is that as soon as the assailants entered the bedroom, they kicked the lantern and it went off as they now went on the rampage cutting the deceased. It is therefore difficult for this court to accept the evidence that both J and C saw the accused in their house on that fateful night. In this regard I am guided by authorities such as **Odhiambo – vs – Republic [2002]KLR 241** and **Nzaro – vs – Republic [1991] KLR 70**. The prosecution case therefore fails on this ground.

(C) whether the accused acted with malice aforethought

26. Section 206 of the Penal Code defines what malice aforethought is, and the court can only reach the conclusion that an accused had malice aforethought when it has been proved beyond any reasonable doubt that the accused is the person who killed the deceased, following proper identification. For this case, this issue is one of academic concern, but is important to state that whoever it is that attacked the deceased there is no doubt that their intention was to kill or cause grievous harm to the deceased. The deceased died. It has not been proved that it is the accused who killed the deceased and therefore malice aforethought cannot be ascribed to him.

Conclusion

27. As I come to the conclusion of this judgment, I must point out that the prosecution failed to adduce the evidence of the investigating officer in spite of having been given opportunity after opportunity to do so. It is a sad state of affairs since the court does not even know how and why the accused was arrested. There is no doubt that a judgment such as this one would leave a bitter taste in the mouth of the victims and especially J and C who were present as blow after blow descended upon their mother. It is hoped that the prosecution, especially the police who are charged with the investigative duty in the criminal justice system will up their game so that the courts are given all the necessary evidence to enable them make well balanced decisions.

28. Having said the above and it being found that the prosecution has not proved its case beyond any reasonable doubt I now make the following final orders:-

1. I find the accused P M B alias K NOT guilty of the murder of J A O and set him free under the provisions of Section 322(1) of the Criminal Procedure Code.
2. Unless he is otherwise lawfully held, the accused shall be released from prison custody forthwith

Orders accordingly

Judgment delivered, dated and signed in open court at Kakamega this 29th day of May 2018

RUTH N. SITATI

JUDGE

In the presence of

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

.....**Mr. Munyendo for Nandwa.....for Accused**

.....**Polycap Mukabwa.....Court Assistant**