



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

HIGH COURT CRIMINAL CASE NO. 59 OF 2011

REPUBLIC.....PROSECUTOR

VERSUS

LEONARD MUKUNZA HENRY.....ACCUSED

JUDGMENT

1. *Leonard Mukunza Henry* and *Simon Kemboi Keino* are jointly charged with the offence of murder contrary to *Section 203* as read with *Section 204* of the *Penal Code*.

It is alleged that on 1st September 2011 at Sango village, Likuyani District within Western Province, jointly with others not before the court, the accused persons murdered *Moses Wekesa Soita*. They denied the charges.

2. In support of its case, the prosecution called a total of ten witnesses. In summary, the prosecution case is that the deceased and PW1 had been employed to keep vigil over a maize plantation in a farm owned by PW3's father. The farm consisted of two parcels which were separated by a river.

3. According to the evidence of PW1, on 1st September 2011, he was on duty in the farm together with the deceased. The deceased was guarding the maize crops in the parcel that was across the river. PW1 recalled that at around 12pm, he heard the deceased screaming and shouting asking him to go and call *Philip Sirengo* [PW3]. He subsequently saw the deceased being led away from the farm by four people namely, *Leonard*, *Kepha*, *Mark* (also referred to in the proceedings as *Mac*) and *Michael*. The four people whom he previously knew were walking behind the deceased quarrelling him in a hostile manner. He identified *Leonard* as the first accused in this case. He claimed that he also saw the 2nd accused in that group. He noted that they were all armed with assorted weapons which included *pangas*, *rungus* [clubs], hammer and iron bar. He did not follow them.

4. PW3 on his part recalled that he was working in a neighbouring farm on the material day when he heard voices coming from the forest which was about 30 metres away. He decided to go to the forest to see what was happening. While near there, he saw four people armed with *rungus*, *pangas* and branches of trees. He was about 10 metres away from them. He knew one of them personally by his name namely *Mark Esere* but he knew the other three people by appearance only. He watched as *Mark* assaulted the deceased with a *rungu*. The other three people though armed stood by surrounding the deceased as he was being assaulted.

He identified two of them as the accused persons herein. He also watched as the four people escorted the deceased out of the forest and proceeded towards the direction of *Mark's* home. He called the deceased's brother *Kennedy Masinde*, (PW5), and father *Fred Barasa*, (PW4), and informed them of what he had seen.

5. In his evidence, PW5 testified that on 1st September 2011 at around 11am, he received a call from his uncle who informed him that *Esere's* family and some workers were beating up his brother, *Moses* (the deceased) as they led him towards the forest. He was in a neighbouring farm so he decided to investigate the claim. On going to the forest, he saw some footprints on the ground which he followed. He then saw four people emerge from the forest holding his brother, *Moses* who was almost naked. He only had his underpants. He shouted at them to stop and they complied. He went closer to them. He saw their faces clearly and noted that each of them was armed with a *panga* and a thick stick (*fimbo* or *rungu*). On being asked why they had beaten up *Moses*, one of his assailants claimed it was because he had trespassed into *Esere's* farm and cut a tree, an allegation *Moses* denied.

6. PW5 further recalled that *Moses* told him that the four people had beaten him severely and he did not see himself surviving. PW5 noted that *Moses's* face was swollen and he was bleeding all over his body. One of the attackers said they were taking *Moses* to their employer's home to have the matter settled. He decided to follow them to *Esere's* home.

7. At *Esere's* home, he was joined by PW4 who had been notified of the attack on *Moses* by PW3 and PW4.

PW4 recalled that he saw *Moses* being led to the compound supported by four people since he could not walk on his own. Two of them held him on each side. They were being led by *Macdonald (Mark)* and *Kepha*. He noted that the deceased's head was swollen and he had cuts on his body. The two accused persons were among the four persons who were supporting the deceased person. He knew them before for many years since they were his neighbours. He noted that all the six men including the accused persons were armed with thick short sticks and a *panga*.

8. PW3 and PW6 also went to the home. PW6 had seen the accused persons together with four other people dragging *Moses* to the home. According to PW6, she found *Moses* in a cattle pen with only his underpants on and with injuries on his head and other parts of the body. She recalled that on seeing her, *Moses* told her that *Macdonald Esere*, *Leonard Igunza* and *Simon Kemboi* had beaten him up in a way that he did not see himself surviving another day. She knew *Leonard Igunza* (1st accused) and *Simon Kemboi* (2nd accused) before since they were *Macdonald's* workers. She testified that her family which had employed the deceased and *Macdonald's* family had a land dispute.

9. The deceased's mother testified as PW7. She recalled that when she got to *Esere's* home upon receiving information that her son had been taken there, she found that he had already been taken to Nzoia Health Centre for treatment. She went to the health centre and found her son badly injured but he was talking. The deceased told her that *Kepha* had removed him from *Sirengo's* farm and took him to a bush where he found five other men waiting. He named three of those men as *Mac Esere*; *Leonard Mukunza* and *Simon Kemboi*. He also said that led by *Mac Esere*, the three men had beaten him ruthlessly. Upon his request, she went home to get his clothes but on going back later, she found he had already passed away. She testified that she knew the people whose names the deceased had mentioned. *Leonard Mukunza* referred to the 1st accused while *Simon Kemboi* referred to the 2nd accused. They were both *Macdonald's* workers.

10. The matter was reported at Nzoia Patrol base to PW10, *Cpl Paul Musyoka* by PW3 and PW5. Accompanied by other police officers, he proceeded to *Esere's* home and organized to have *Moses* taken to Nzoia dispensary. A crowd of people was in the compound baying for *Macdonald's* blood. They destroyed his house and burnt a car. The accused persons were in the compound and were assaulted by the crowd before they managed to escape. They went to a nearby dispensary for treatment and this is where they were arrested.

11. On 8th September 2011, PW9, *Dr Kakundi Mbithi* performed an autopsy on the deceased's body.

Externally, he noted that the body had abrasions on the right upper lid, left side of the chest and on the back. There was ecchymosis (blood clot) on the right thigh and hematoma on the front side of the head measuring 4cm in diameter. On dissection, he found clotted blood in the muscles of the left 6th – 8th rib. Blood of about 1 litre had accumulated on the left side of the chest. The same volume of blood had collected in the abdominal cavity.

After his examination, he formed the opinion that the cause of death was severe chest and abdominal injuries caused by a blunt object. On being cross examined by learned counsel for the accused, *Mr Chepkwony*, PW9 stated that even if the deceased suffered from sickle cell disease, the disease could not have caused his death.

12. After the close of the prosecution case, I determined that both accused persons had a case to answer and I consequently put them on their defence.

13. In their respective defences, the accused persons elected to give unsworn statements. They did not call witnesses. In their unsworn statements, each of the accused persons denied having participated in the murder of the deceased in the manner alleged by the prosecution witnesses. They both admitted that on the material day, they were employed to work in *Evan Esere's* home, apparently under the supervision of his son *Macdonald (Mark)*. They denied that on 1st September 2011, they had accompanied *Mark* to the *shamba*. They claimed that they remained in *Esere's* compound performing their different chores.

14. The 2nd accused in addition recalled that later that day, he was called by *Mark's* mother and requested to calm down people who had invaded her compound. They wanted to beat up *Mark*. He also saw the deceased in the compound with injuries on his head and back. He was taken to hospital for treatment. He further stated that later that day, another crowd went to the home and burnt down a store after hearing about the death of the deceased. As the 1st accused was injured in the fire, he took him to hospital for treatment accompanied by other people; that the two of them were arrested while in that hospital and were taken to Matunda police station. *Kepha* and *Mark* were also arrested but were later released though in his view they were the ones who had committed the offence.

15. I have carefully considered all the evidence adduced in this case in its entirety. I have also considered the submissions made on behalf of the accused persons by their learned counsel both at the close of the prosecution and the defence cases.

16. Section 203 of the *Penal Code* is the law that creates the offence of murder. It provides that “**any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder**”.

17. From the above provision, it is clear that three key ingredients must be proved to exist before the offence of murder is established. These are:

- i. The death of the deceased;
- ii. That the death was caused by the accused's unlawful act or omission; and
- iii. That in committing the act or omission, the accused had malice aforethought.

18. Malice aforethought is the term used to refer to the intention to kill another person. It is in other words the *mensrea* for murder. Section

206 of the *Penal Code* provides the circumstances in which malice aforethought shall be deemed to be established. It shall be proved by evidence showing the following:

“(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.”

19. A reading of *section 206* of the *Penal Code* reveals that malice aforethought can take various forms. It can be express, constructive, implied or inferred from a set of circumstances. It is constructive where the homicide is committed in furtherance of a felony or when resisting or preventing lawful arrest – see *Raphael Mbuvi Kimasi V Republic, Court of Appeal at Nyeri Criminal Appeal 61 Of 2013, [2014] eKLR*. It is express where there is evidence showing intention to cause death while it can be inferred from circumstances establishing an intention to cause grievous bodily harm or where it is proved that the accused knew that there was a serious risk that death or grievous bodily harm would occur from his conduct but he nevertheless recklessly engaged in that conduct without any lawful excuse. See: *Nzuki V Republic, [1953] KLR 171*.

20. Applying the above principles to the evidence adduced in this case, I find that the prosecution has proved beyond doubt the death of the deceased. What falls for this court’s determination is whether the prosecution has proved beyond any reasonable doubt that the accused persons jointly with others not in court caused the deceased’s death with malice aforethought.

21. My appraisal of the evidence reveals that the prosecution’s case is primarily premised on the alleged identification of both the accused as persons who participated in the assault of the deceased on the material date. Besides the evidence of identification, there is also evidence that on the same day prior to his death, the deceased named them as some of his assailants.

22. On identification, the Court of Appeal in *Wamunga V Republic [1989] KLR 424*, held as follows:

“It is trite law that where the only evidence against a defendant is of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from the possibility of error before it can safely make it the basis of a conviction.”

See also *Joseph Ngumbao Nzaro V Republic, [1991] KLR 212*.

23. In this case, it is not disputed that the attack on the deceased occurred between 11am and 12pm in broad daylight. PW2 recalled that after hearing the voices in the forest, he went there and found the deceased being assaulted with a *rungu* by his neighbour *Mark Esere* while three other people were standing by surrounding the deceased. He identified two of those people as the accused persons herein. He testified that he saw them clearly as he was standing about 10 metres away. He was even able to see the weapons they were armed with. PW1, PW4, PW5 and PW6 all recalled that they saw *Macdonald, Kepha* and both accused persons armed with assorted weapons including *rungus* and *pangas* escorting the deceased from the forest to *Esere’s* home. They noted that the deceased was partially naked and he had severe injuries on his head and body. PW5 recalled that he approached them enquiring why they were assaulting the deceased.

24. Given the foregoing evidence, I am satisfied that the accused persons were properly identified by PW1, PW2, PW3, PW4, PW5 and PW6 as the persons who stood by watching as *Mark* mercilessly clobbered the deceased with a *rungu*. PW2 and other witnesses also saw them as they escorted the deceased to *Esere’s* compound. By that time the deceased was half naked and had serious injuries. These witnesses knew *Macdonald, Kepha* and the accused persons very well prior to that date since they lived in the same neighbourhood.

25. Since it was during the day and these witnesses saw the accused persons and their accomplices at close quarters, I have no doubt in my mind that the circumstances prevailing at the time were favourable to a positive, correct and reliable identification of the assailants. Besides, for the most part, this was a case of recognition which is always more assuring and reliable as opposed to a case of identification of a mere stranger. See: *Anjononi & Others V Republic, [1976-80] 1 KLR 1566*.

26. The evidence of identification and/or recognition was further strengthened by the dying declaration made to PW5, PW6 and PW7 by the deceased just before he passed on. He named them together with *Macdonald* and *Kepha* as his assailants.

27. Dying declarations are admissible in evidence as an exception to the hearsay rule. Their admission is allowed under *Section 33* of the *Evidence Act* which states as follows:

“Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases—

(a) When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."

28. The Court of Appeal in ***Stephen Muturia Kinganga V Republic, Criminal Appeal 305 of 2011 [2013] eKLR*** and in ***Philip Nzaka Watu V Republic, Criminal Appeal 29 of 2015, [2016] eKLR***, discussed the probative value of dying declarations and held that trial courts must exercise great caution before making a dying declaration the basis of a conviction.

The dying declarations in this case were corroborated by the evidence of identification of the accused persons as having been participants in the assault of the deceased.

29. I have considered the defence proffered by the accused persons. They gave unsworn statements in which they denied having come into contact with the deceased in any way on the material date. Their claim that they stayed in *Eseré's* compound the whole day and did not participate in the assault of the deceased is false because they were placed at the locus in quo by PW2 and were separately seen by the other witnesses escorting an already injured deceased from the forest to *Eseré's* compound. I saw all these witnesses as they testified and I am satisfied that they were credible and reliable witnesses. I have no reason to doubt their evidence.

30. From the evidence of PW9, there is no doubt that the deceased died of the injuries sustained in the attack witnessed by PW2. The doctor was firm in his evidence that the deceased died not from sickle cell disease as suggested by the defence but from pulmonary failure secondary to severe chest and abdominal injury caused by a blunt object. This is consistent with the injuries sustained by the deceased on the material day and the manner in which the injuries were inflicted.

31. Even though the evidence centred on one *Macdonald* as having been the principal assailant, the fact that there is strong evidence that the accused persons were armed and just stood by watching as if supervising *Macdonald* as he assaulted the deceased with a *rungu* and they subsequently dragged the deceased with his injuries for some distance to *Eseré's* compound leave no doubt that the accused persons shared a common intention with *Macdonald* and *Kepha* of causing grievous bodily harm to the deceased allegedly because he had cut a tree or stolen fencing poles from *Eseré's* farm.

32. Under *Section 21* of the *Penal Code*, the accused persons must be taken to have participated in the assault that led to the deceased's death. See: ***Nyabuto & Another V Republic, [2009] KLR 409; Republic V Olouch & 4 Others, (1992) KLR 250.***

The viciousness of the attack on the deceased as evidenced by the severity of the injuries he suffered and the monstrous way he was treated by his assailants leave no doubt that the accused persons and their accomplices had the requisite malice aforethought.

33. In view of the foregoing, I have come to the conclusion that the prosecution has proved the charge of murder against the accused persons beyond any reasonable doubt. I consequently enter a finding of guilty and convict each accused person accordingly.

It is so ordered.

DATED and SIGNED at NAIROBI this 7th day of June, 2018.

C. W. GITHUA

JUDGE

DATED and DELIVERED at ELDORET this 27th day of June, 2018.

S. M. GITHINJI

JUDGE

In the presence of:

Mr Chepkwony: Advocate for the accused

Ms Mokuu: Advocate for the State

Mr Joseph: Court Clerk