



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CRIMINAL DIVISION

CRIMINAL CASE NO. 51 OF 2015

REPUBLIC ..... PROSECUTOR

VERSUS

LILIAN AYUMA ATIATO ..... 1<sup>ST</sup> ACCUSED

PAMELA ATIENO ODENDE ..... 2<sup>ND</sup> ACCUSED

JUDGEMENT

1. The accused persons were charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the Penal Code the particulars of which were that on 8<sup>th</sup> day of May, 2015 at Mbotela Estate in Makadara District within Nairobi County murdered **DAVID KICHUKU KARERI**. They pleaded not guilty to the said charges and on 6/3/2017 the trial commenced before me.

PROSECUTION CASE

2. The prosecution case against the accused persons was that **PW1 PETER NJUGUNA KAREMI** was on 8/5/2015 at about 5.00 a.m. called by a neighbour – “**Mama Sophia**” and told that his brother the deceased was being beaten in his house. He proceeded there and found the deceased being beaten by the accused persons and three (3) men who were also the deceased neighbours and who were not charged. It was his evidence that there were no other people at the scene apart from the five (5). He stated that the 1<sup>st</sup> accused had a club while the 2<sup>nd</sup> accused had an iron bar. It was his evidence that the deceased told him that he was being beaten on account of electricity which he had disconnected.

3. Under cross-examination he stated that he did not raise any alarm. He stated that he was able to see with the aid of street lights. He is the one who gave the description of the accused persons to the police and his mother led the police to arrest one of the accused persons.

4. **PW2 GRACE MURINGI GICHUKI** the mother of the deceased and **PW1** testified that on 8<sup>th</sup> May 2015 the deceased reported to her that his sister’s electricity was being tapped and at 5.30 a.m. the wife of **PW1** went to her house and informed her that the deceased was being assaulted. She proceeded to the scene and found the deceased who told her that he knew those who had assaulted her. It was her evidence that at the scene she found the two accused persons and a crowd that was watching and that the 2<sup>nd</sup> accused was shouting that the deceased had stolen her chicken. The deceased was then taken to Mama Lucy Hospital from where he died. She stated that she did not see the accused persons assaulting the deceased.

5. **PW3 IRENE NJERI JOSEPH** a sister of the deceased was called by **PW2** her mother with information that the deceased had been assaulted by his neighbours and had been rushed to Mama Lucy Hospital. She went to the hospital and found the deceased dead with injuries on the head and nose. She was then informed by **PW1** that he knew those who had beaten the deceased. It was her evidence that the deceased was staying in her house at Mbotela and when the bill became high she decided not to pay and the line was disconnected and when she checked there was a naked wire from the meter box. This was a week before the deceased died. It was her evidence that the 1<sup>st</sup> accused had at some stage requested her to assist her with electricity but she referred her to the owner of the house she was renting. She had known the 2<sup>nd</sup> accused since childhood as they grew up together.

6. In cross-examination she stated that it is **PW1** who told her that the accused persons had assaulted the deceased. **PW4 JOSEPH KARERI NJUGUNA** attended postmortem examination and identified the body to **PW7 DR. DOROTHY NJERU** who confirmed that the deceased had fractures of two tibia and fibula of the right lip, soft tissues injuries to both hands and bleeding on the brain. She formed an opinion that the cause of death was multiple injuries caused by blunt force trauma.

7. **PW5 PC AMISI MURAJA** received a report of mob injustice where the victim died while undergoing treatment and that the suspects were at large. In the company of the family members of the victim he proceeded to Mbotela Estate where he arrested the two accused on 12/5/2015. He attended postmortem examination. **PW6 PC BENSON KIMERU** was instructed by the duty officer to go to Mbotela Estate where a disturbance had been reported. He interrogated the people he found at the scene who gave them no information. It was his evidence that the scene looked like there had been a fight. He received information that there was an allegation of theft made and that they were taken to a house where items had been burned on the table. When he talked to the deceased he said he knew those who had attacked him but did not give their names. He stated that the brother of the deceased told him that he had been called and told that his brother was being beaten on allegation that he had stolen. It was his evidence that the initial report was given to the OCS.

8. **PW8 INSPECTOR JOSEPH MULI** confirmed having received information of mob injustice on 8/5/2015 within Mbotela Estate from Chief Inspector Masai who had the mother and the sister of the deceased who said that there were two ladies known to them who were involved in mob injustice. He proceeded there and arrested the two. He stated that they recovered a metal bar from the sister of the deceased.

#### DEFENCE CASE

9. When put on their defence the accused gave sworn statement. **DW1 LILIAN AYUMA ATIATO** stated that on 8/5/2015 while in the house at 11.00 p.m. she heard the deceased talking to people outside warning that they will know why he had been to Kamiti. She went to bed upto 4.00 a.m. when she heard noise from a neighbour alerting them to wake up as one of the houses was burning. She went out and assisted in putting off the fire. At 6.00 a.m. she went to the road side where there was a crowd, when she moved close she saw the deceased who was alleged to had stolen from a house in the area having been assaulted and sitting on the ground. She thereafter saw the mother of the deceased. She left the scene and continued with her daily activities until she was arrested by the police and taken to the police station on allegation that she had assaulted the deceased which she denied.

10. **DW2 PAMELA ATIENO ODENDE** also gave sworn evidence and stated that on 8/5/2015 she woke up at 5.30 a.m. to prepare her children for school when she met a neighbour "Mama Mbete" who told her that she had gone to see a man who had been assaulted on allegation of theft. She also went to the scene and found the deceased who she had known. She called out his name but he did not respond after that she went to her house until 12.00 where she met the mother and sister of the deceased together with another woman and the mother of the deceased pointed her out to the police who arrested her. She denied having committed the offence.

#### SUBMISSIONS

11. At the close of the defence case the prosecution opted not to make any final submissions. On behalf of the accused persons it was submitted that the prosecution had not proved its case beyond reasonable doubt as the case was full of contradictions. It was submitted that the prosecution failed to prove the motive for the murder as its attempt to link it to the dispute involving electricity did not link the accused persons to the matter. It was submitted that the initial report was that the deceased had been assaulted by a mob on allegation of theft which was confirmed by the 1<sup>st</sup> accused who heard that the reason he was being beaten was because he was a thief. This was confirmed by **PW6** who said that a house had been broken into.

#### ANALYSIS AND DETERMINATION

12. For the state to sustain a conviction on a charge of murder the following ingredients of the offence must be proved beyond any reasonable doubt:-

*a) The fact and cause of death of the deceased.*

*b) That the said death was caused by unlawful act of omission or commission on the part of the accused person.*

*c) That the said act of omission or commission was one with malice aforethought as defined in Section 206 of the Penal Code.*

13. The fact and the cause of death of the deceased are not disputed. **PW1 PETER KARANJA KAREMI** the brother, **PW2 GRACE MURINGI GICHUKI** the mother, **PW3 IRENE NJERI JOSEPH** the sister, **PW4 JOSEPH KARERI NJUGUNA** the father, **PW3 PC BENSON KIMERU** the first police officer at the scene all confirmed the fact of death of the deceased while **PW7 DR. DOROTHY NJERU** confirmed the cause thereof through postmortem report produced in court as multiple injuries due to blunt force trauma.

14. The only issue in controversy is whether the said death was caused by unlawful act of commission or omission on the part of the accused persons. It is not disputed that the accused persons were neighbours of the deceased at Mbotela Estate Nairobi with the 2<sup>nd</sup> accused being the immediate neighbour of the deceased while the 1<sup>st</sup> accused was on the opposite side of the road. The attack on the deceased occurred at the morning of 8<sup>th</sup> May 2015 at about 5.00 a.m. or thereabout. It was **PW1's** evidence that he was called by one "Mama Sophia" to scene where he found the two accused persons together with three men beating the deceased at the verandah of his house. This evidence is contradicted in material particular by that of **PW2** the mother of the deceased whose evidence was that the deceased was being beaten next to the road. Whereas **PW2** states that there were street lights **PW2's** evidence is that there were no street lights thereby corroborating the 1<sup>st</sup> accused's testimony. Whereas **PW1** stated that he saw the accused persons assaulting the deceased, when **PW2** got to the scene she allegedly found the accused persons amongst the assembled crowd and that the deceased only told her that he was beaten by the neighbours. This evidence is further contradicted by that of **PW6** the first police officer at the scene whose evidence was that the deceased could not talk well and only kept on asking for water. It was further his evidence that he interviewed those he found at the scene but obtained no information from them. This further contradicts the evidence of **PW1** who stated that there were only five (5) people at the scene.

15. From the evidence tendered the only person who linked the two accused persons to the incidence herein is **PW1** but his evidence is not corroborated and is contradicted in material particulars by that of **PW6** the first police officer at the scene whose testimony was that **PW1**

told him that he had been called and informed that his brother was being beaten on the allegation that he had stolen. It was his further evidence that nobody at the scene mentioned the names of the accused persons.

16. It is clear from the evidence tendered before the court that the deceased was a victim of mob injustice as confirmed by the evidence of **PW8** Inspector Joseph Muli who confirmed that the initial report received at the station indicated so. This was further confirmed by information indicated on the postmortem report and he further confirmed that the accused persons were only arrested as suspects since it was alleged that they were at the scene. An attempt was made through the evidence of **PW3** to link the accused persons with the theft of electricity as the cause of the attack but at the close of the prosecution there was no evidence tendered to establish that there was indeed connection of electricity from her house to the houses of the accused persons and whether the said illegal connection had been disconnected. Even if that were to be so why would the accused persons wait to assault the deceased in the early hours of the morning?

17. The prosecution further failed to secure the attendance of vital witnesses including Sophia who called **PW1**, **PW1's** wife "**Mama Kareri**" who called **PW2** to the scene, the old man who had allegedly agreed with **PW3** to help resolve the dispute related to electricity called "**Zinga**" and the OCS who received the initial report on the disturbance within the estate thereby leading the court to make an adverse inference that the said witnesses would have been adverse to the prosecution had they been called as per the holding in **BUKENYA v UGANDA**.

18. I have further taken into account the accused persons testimony before court which is consistent to the information they gave to **PW8** upon their arrest and being alive that there was an allegation of the deceased being accused of theft, there remains a possibility that the accused persons who were his neighbours were only mentioned by the family of the deceased as suspects so as to make the deceased "smell nice" in death.

19. Having analyzed the evidence tendered before the court and this being a criminal matter where the prosecution has to prove its case beyond reasonable doubt, with the contradictions and inconsistency in the prosecution case as stated herein, there remains a doubt in the mind of the court of the accused persons involvement in the mob injustice meted against the deceased which subsequently led to his death. Their mere presence at the scene in the absence of direct evidence of their participation cannot be a ground to find them guilty of the offence of murder. At the close of the prosecution case, no motive was established on the part to the accused persons to cause actual bodily harm on the deceased, with the prosecution evidence pointing to the same being a victim of mob injustice on allegation of theft in one of the houses within the estate thereby raising doubt on the prosecution case the benefit of which the accused persons are entitled to in law.

20. The prosecution further failed to establish a common intention on the part to the accused persons with the mob that is alleged to have assaulted the deceased so as to make them liable under the provision of **Section 21** of the **Penal Code**.

21. I therefore find and hold that the prosecution has failed to prove its case against the accused persons beyond reasonable doubt and hereby find the accused persons not guilty and I hereby acquit both accused persons. The accused persons shall be set free forthwith unless otherwise lawfully held.

**DATED, DELIVERED and SIGNED at Nairobi this 21<sup>st</sup> day of June, 2018.**

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**J. WAKIAGA**

**JUDGE**

**In the presence of:-**

*Ms Wegulu for the State*

*Mr. Ndung'u for the accused persons*

*Accused 1 and 2 persons present*

*Court assistant Karwitha*