



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL (MURDER) CASE NUMBER 20 OF 2011

REPUBLIC.....PROSECUTION

VERSUS

GODFREY LIKHANGA.....1ST ACCUSED

DAVID SHIANDUMBA.....2ND ACCUSED

WILLIAM BANDI.....3RD ACCUSED

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Introduction

1. All the three accused persons, GODFREY LIKHANGA, DAVID SHIANDUMBA and WILSON BANDI are charged with two counts of ***murder contrary to section 203 as read with section 204 of the Penal Code***. The particulars in count I are that on the 25th day of March, 2011 at Nandikhula Village, Mukulusu Sub-Location Murhanda Location in East Kakamega District within Western Province, they murdered MAURICE CHITIRA LIKUYANI.
2. In Count II, the particulars of the offence are that on the 25th day of March, 2011 at Nandikhula Village Mukulusu Sub-Location, Murhanda Location, they murdered JONATHAN MUSUNDI MUHUNZU.
3. The accused persons pleaded not guilty to the charges when they appeared before Kimaru J on 12th May, 2011. Thereafter the prosecution availed three witnesses who testified against the accused persons.

The Prosecution Case

4. PW2, Mary Mboya, (Mary) told the court that at about 8.00pm, on 25th March, 2011, she was in her house when the village elder ran to her house and informed her that some people were chasing him. The village elder also told her that he wanted to report the incident to the Assistant Chief. According to her testimony, a "Koroboi" (tin lamp) was alight and placed on the table which was placed in the middle of the sitting room of her house. After telling her these things the village elder telephoned the Assistant Chief and shortly after that the Assistant Chief arrived. No sooner had the Assistant Chief arrived than three people entered Mary's house, and according to her testimony, the three persons who entered her house were the three accused. She said the three accused cut the village elder on the front left side of the head and on the chest. They did not talk to her.
5. Mary also stated that Bandi (third accused) cut the Assistant Chief on the left hand with a machete and he (Assistant chief) fell on Shiandumba (second accused). The second accused dragged the Assistant Chief out of the house and stabbed him to death. Mary panicked when she saw what was happening and she ran out of the house. She escaped to the home of her brother in-law, one Disi where she remained for the rest of the night. In the morning, Mary and others went and reported the matter to the police. Mary was able to identify all the three accused persons during her testimony and told the court that they were all well known to her. Mary also stated that when the accused persons entered her house, none of them talked to her.

6. During cross examination, Mary told the court that her sitting room was a small room, roughly ten by ten feet according to the comparison she gave of its size being half the size of the court room. She also stated that the wall was dark though she claimed to have seen the accused persons well. She however said she could not remember the colour of the clothes the accused were wearing on that fateful night. Mary also

told the court that though she screamed as she ran towards Disi's house, no neighbours answered to her screams, and that she ran away after the victims had died.

7. In further cross examination Mary told the court that she did not see the knife which had been used to stab the Assistant Chief to death, and that it was the police who came with the knife. She also testified that the police are the ones who brought the clubs. She also stated that she saw all the three accused armed with machetes, and that the third accused used his machete to cut the Assistant chief. All the three accused, are related to Mary.

8. Boniface Kanga Mboya (Boniface) testified as PW3. He testified that on Friday 25th march, at about 9.00pm, he was in his house listening to the radio when he heard screams from his brother BENSON LIKHANGA. Before he could take any step, Boniface heard more noise which appeared quite close to his (Boniface's) house. Then suddenly, someone knocked on the door three times. The door caved inwards. Then there was torchlight from outside into the house and Boniface heard Benson Likhanga say, "**He is inside here.**" Boniface stooped low and made his way to the outside, as he observed the three accused Likhanga, Shiandumba and Bandi. The three accused chased Boniface towards the lower side of the house. The first accused who was quite close to Boniface cut Boniface on the left hand using a machete. Boniface had some stones so, he threw one stone at Likhanga, felling him down. Boniface then ran away, but the trio, led by the third accused who had a dog looked for him in the neighbours' houses. Boniface ran to Fredricks's house (Fredrick was not called as a witness).

9. At about 1.00am according to Boniface, the police arrived at the scene. By then he had been assisted to get back to his home and when he got there, he found the bodies of the village elder and the Assistant Chief. According to Boniface, his house did not have any light, and that the only light at the scene at the time of the incident was light from the torches which were carried by the accused persons. He also testified that when he ran out of the house, he left his wife and children behind. Although it was not said so, the wife was Mary. He also testified that when he saw the accused persons, the first accused was armed with a machete while the second accused had a knife. The third accused was standing at the window and had a dog with him.

10. During cross examination, Boniface testified to the following matters: - When the three accused entered his house, the lamp had gone off and only recognized them when they lit their torches. The first accused talked in a loud rough voice, the kind that Boniface had not heard the first accused speak in before. Boniface said of the three accused had a hammer though he could not say who of the three had the hammer, though he also said it was first accused who had the hammer. As he was escaping from the accused persons the first accused first cut him on the back and then on the hand. He did not mention a torch or torches in his statement to the police. Though he was allegedly taken for treatment by the police, he was not able to avail the treatment notes.

11. In re-examination, Boniface stated that he recognized the accused persons by their voices and that he was only able to recognize them physically when they flashed their torches.

12. Dr. Dixon Mchana testified as PW1. He is the one who conducted post mortem examinations on the bodies of the deceased persons on 28th March, 2011. With regard to the body of Maurice Chitira Likuyani, which was identified to him by two relatives, the deceased was in his mid-50's. The deceased's clothes were not only blood stained but were also torn. Externally the body had the following injuries:-

graze below the chin

graze in front of left shoulder

stab wound on front of right shoulder

three stab wounds on front of chest

one stab wound below left rib margin and another stab wound below the right blade.

three stab wounds around the spine between 8th and 10th chest spinal bones.

three stab wounds and nine grazes on the back.

one stab wound on the right buttock

13. Internally, there was a lot of bleeding under the skin. The right 6th rib was split into two accompanied by perforations in the right rib. The right lung had three stabs. The right side of the liver also had a stab wound.

14. In the opinion of Dr. Mchana, the cause of death for Maurice Chitira Likuyani was severe blood loss secondary to multiple wounds as a result of an assault. The duly filled and signed postmortem report in respect of the first deceased was produced as Pexhibit 1.

15. With regard to the second deceased, Jonathan Musundi Mulunzu, Dr. Mchana testified that his clothes were blood stained. Externally, the following injuries were noted-

- lacerations on left pinna mid-section 4cm long with transection adjoining the temporal scalp leaving a 4cmlong incised wound.
- 8 stab wounds on anterior chest ranging from 3x2cm to 4x2cm

- 8 stab wounds on left arm ranging from 2x5cm diameter to 6x3cm
- 7 stab wounds /incised wounds on left forearm ranging from 2.5x1.5 to 7x2.5cm with compound disarticulation dorsal left wrist joint.
- proximal compound fracture of the left radius
- external dorsal compound disarticulation measuring 3x2cm
- medial aspect of the right thumb distal phalanx sliced to leave a flap 3cm long
- laceration on lower left thigh posteriorly with laceration 5x2cm

16. On the respiratory system Dr. Mchana noted the following injuries:-

- perforation through 2nd/3rd intercostal spaces
- left 4th rib fractured twice anteriorly.
- perforation into 2nd/3rd intercostal spaces with massive bilateral haemothorax
- widespread contusion of both lungs with more haematoma on both lung lobes due to fibrous adhesions.
- lung perforation mid-right lobe – x1 (through and through)
- upper right lobe – x1
- left upper lobe x 2 perforations
- left lower lobe – x2
- perforation extending from left ventricle to right ventricle with massive hemopericardium with 2 pericardial tears

17. According to Dr. Mchana, the cause of death of the second deceased was given as severe hemorrhage secondary to multiple stab wounds following assault. The post mortem report on the second deceased was produced as Exhibit 2.

18. Before the prosecution closed its case, it had been adjourned on many occasions to give the prosecution time to call its remaining witnesses. When the case finally came up for further hearing on 22nd February 2018, the Court was informed that the investigating officer, one PC Owino Asin had since died. For that reason, counsel for the prosecution closed its case.

The Defence Case

19. At the close of the defence case the court found all the three accused had a case to answer. They each gave sworn evidence and denied the charges leveled against them; although each of them conceded they knew both deceased persons. The three accused also stated that the evidence given by Boniface was not true. From the evidence, the first and second accused are uterine brothers while the third accused is a son to the sister of the first and second accused. Mary was a neighbour who had lived in the area since 1997. Each of the three accused expressed utter shock at having been connected with the death of the two deceased.

Submissions

20. Mr. Aburili Advocate, who came into the matter after the court had already heard the testimonies by Mary, Boniface and Dr. Mchana filed written submissions on 7th June. Counsel submitted that the prosecution had not proved that the accused persons had the necessary *mens rea* to support the charges against them. Counsel also submitted that the prosecution had not proved beyond any reasonable doubt that the accused persons or any of them, was properly identified for purposes of placing him at the scene of the alleged murders. More detailed consideration of the submissions to be done during analysis and determination.

Issues for determination

21. The issues for determination in this case arise from the provisions of **Sections 203 and 206 of the Penal Code**. In this regard therefore, the prosecution must prove:-

- a) the fact and cause of death of the deceased persons;
- b) that the accused persons, through their unlawful acts or omissions caused the death of the deceased persons;
- c) that in causing the death of the deceased persons, the three accused acted with malice aforethought

22. The law requires that all the three ingredients be proved before this court can reach the conclusion that the accused herein are guilty of the offences.

Analysis and Determination

23. I shall deal with the issues one by one in order to establish the totality of the prosecution case against the accused.

a. Whether the fact and cause of death of the two deceased was proved by the prosecution

24. There is absolutely no doubt that the fact and cause of the death of the deceased persons has been proved to the required standard. Although none of the persons who identified the bodies to Dr. Mchana were available to testify there is sufficient evidence on record to prove the fact and cause of death of the two deceased persons. Dr. Mchana testified that each of the two bodies was identified to him by two persons. Mary and Boniface (who appear to this court to be man and wife and at whose house the two deceased met their death) testified that they saw the dead bodies of the two deceased. According to Mary, by the time she was fleeing from her house at around 8.30-pm on 25th March, 2011, the deceased persons had already died.

25. Dr. Mchana gave chilling details of the injuries sustained by each of the deceased during the attack. This court can only compare the deceased's death to the death of a rogue elephant or lion that has been captured by irate members of the public whose crops or animals are under attack by those wild animals. Dr. Mchana produced the post mortem examination reports in respect of the two deceased as Exhibits 1 and 2. The harder issue for the prosecution concerns the identity of the beastly assailants who caused the death of the village elder and his assistant chief. Having established the fact and cause of death of the two deceased, I now proceed to the next more contested issue.

b. Whether it is the three accused, or any of them who caused the death of the deceased through an unlawful act or omission.

26. From the evidence, the attack on the deceased persons took place between 8.00pm and 9.30pm on the night of 25th March, 2011. It was a dark night, and this being the case, the question of identification has to be carefully considered by this court. The court notes that all the parties in this case hail from Mukulusu Village of Murhanda Location and they are all known to each other. It is therefore a matter of recognition as opposed to the identification of a stranger, which as was held by the Court of Appeal in ***Wamunga versus Republic [1989] KLR 425*** may be more reliable than identification of a stranger, but mistakes in recognition of close relatives and friends are sometimes made.

27. It is also on record that the attack herein took place inside a house which had no lighting or very poor lighting. According to Mary, when the attackers entered the house, the tin lamp was alight but the walls were dark. According to Boniface, at the time of the attack the lamp had gone off. In the ***Wamunga case*** (cited by defence counsel in his submissions), the Court of Appeal held, inter alia that ***"Where the only evidence against a defendant is evidence 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 possibility of error before it safely made it a basis for a conviction."***

28. In the case, the Court of Appeal ruled that the identification evidence upon which the appellant's conviction was based had not been shown to have been free from the possibility of error.

29. In the present case, I do find and hold that the recognition of the three accused by both Mary and Boniface was not free from the possibility of error. In the first place, there is uncertainty in the mind of this court as to whether or not there was any light in the house where the attack took place. Mary's evidence is particularly doubtful because she said that she panicked when the three accused entered the house, and her only aim was to escape which she did and ran off to Disi's house where she spent the night. Even if she had a moment to see the attackers, the moment was only a fleeting one and that moment would not have been sufficient for her to take in the appearances of the accused. No wonder she said she could not remember what type of clothing the accused persons were wearing on that night. It is also worth noting that none of the accused spoke a word when they entered the house. In the circumstances, Mary's assertion that she recognized all the three accused persons is doubtful, and in such a case, the benefit of the doubt must go to the accused.

30. As for Boniface, he confirmed that there was no light in the house when the incident occurred. He also said that after the door caved into the house, he heard the first (whom Boniface referred to as Renison Likhanga) say in an unusually loud and rough voice, ***"He is inside here."*** And immediately he heard those words, he stooped down and made his way out of the house. Boniface went on to describe the type of weapons each accused had, alleging that he was able to make the observations using light from the torches shone by the accused persons. However during cross-examination, Boniface admitted that there was no mention of torches in his statement to the police. It thus becomes more doubtful that he was able to see anything or anyone. He was concerned with his own safety and had no time even to see if it was his brother who was in the house or another. I also find two material contradictions in the evidence given by Mary and Boniface, and these are whether any of the assailants spoke or not and whether there was any light in the house or not. All these doubts would go to the benefit of the accused persons despite the fact that this court finds the stories by the accused persons as to what happened on that fateful night unconvincing. There is also a material contradiction in Boniface's own testimony. In one breathe, he said the third accused was armed with a machete and in the other he said the third accused was standing at the window with a dog. The bottom line of the above analysis is that both Mary and Boniface either exaggerated what they saw or they did not witness the incident at all.

31. I must also add here that my sixth sense tells me the accused were the attackers, but that gut feeling cannot be used as a basis for convicting any of the accused persons. The burden of proving the case against the accused to the required standard rested squarely on the shoulders of the prosecution. None of the accused was obliged to say anything in response to the allegations. The prosecution has not discharged that burden.

32. For the above reason I find and hold that the prosecution failed to prove the second ingredient of the offence of murder as alleged.

c. Whether the prosecution has proved malice aforethought

33. Without proof of malice aforethought, the offence of murder cannot succeed. In his written submissions, defence counsel, Mr. A. G. Aburili defined murder as is defined by Michel J. Allen et al in ***Text Book on Criminal Law, 6th Edition*** by Oxford University Press in Chapter 9.2 page 297 as follows:-

"Murder is unlawful homicide committed with malice aforethought, "malice aforethought" describes the mens rea required for a conviction of murder, if "malice aforethought" is lacking the unlawful homicide will be manslaughter."

34. Counsel also quoted chapter 3.1. page 49 of the same text book to the effect that:-

“Where a person has performed acts or brought about consequences which constituted the *actus reas* of an offence he will generally be found guilty of the offence if only he had the necessary “*mens rea*” at the time he acted.....offences which require “*mens rea*” are generally regarded as more serious than those which may be committed negligently or for which liability is strict.”

35. I agree with the above and note that in the instant case, there is no proof that the accused were involved in any acts or omissions as a result of which the two deceased persons died. And if that be the case, then malice aforethought cannot attach to them. Consequently, I find and hold that the prosecution failed to prove malice aforethought as defined by the provisions of **section 206 of the Penal Code, Cap 63 Laws of Kenya**

Conclusion

36. As I conclude this judgment, I have a feeling that there was either unwillingness to investigate this case or the investigators did their work without care. CPL Owino Asin is dead, and maybe he is the one who went to the grave with the keys that could have unlocked these murders. For now, the brutal murders of the two public servants remain unresolved.

37. For the reasons that none of the three ingredients of the offence of murder has been proved, I find GODFREYY LIKHANGA, DAVID SHIANDUMBA and WILLIAM BANDI not guilty of murder on each of the two counts. I accordingly acquit them of the same under section 322(1) of the Criminal Procedure Code.

38. Unless they are otherwise lawfully held, all three accused are to be released from prison custody forthwith.

It is so ordered.

Ruling written and signed at Kapenguria

RUTH N. SITATI

JUDGE

Ruling delivered, dated and countersigned in open court at Kakamega this 30th day of July, 2018.

WILLIAM M. MUSYOKA

JUDGE

In the Presence of

Mr. Juma for the state

Mr. Aburili for the accused

Erick/Polycarp Court Assistant