



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CRIMINAL CASE NO. 7 OF 2016**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**L P J.....1<sup>ST</sup> ACCUSED**

**J T J.....2<sup>ND</sup> ACCUSED**

**G M M.....3<sup>RD</sup> ACCUSED**

**RULING**

1. The 1<sup>st</sup> accused L P J (A1), the 2<sup>nd</sup> accused J T J (A2) and the 3<sup>rd</sup> accused G M M (A3) are charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence disclose that on the night of 28<sup>th</sup> and 29<sup>th</sup> April, 2016 in Kilifi County, the accused persons jointly murdered J K M.
2. J K M, A C G, AP Sergeant Siraji Haji Kesane, Dr. Aziza Majid and Chief Inspector Raymond Malel testified for the prosecution.
3. The question at this stage is whether the evidence adduced by the prosecution witnesses is sufficient to warrant the accused persons being put on their defence. In other words, were the accused persons to opt to offer no evidence in their defence, is there sufficient evidence to convict them?
4. In a charge of murder, a conviction will only arise where it is established that the deceased died as a result of an unlawful act or omission on the part of the accused person. The prosecution must also establish that the accused person had malice aforethought.
5. The evidence placed before this court clearly established that a human hand was involved in the exit of the deceased from this world. Dr. Aziza Majid produced a post-mortem report prepared by Dr. Yunus showing that the deceased had a skull fracture on the left ear region. The injury appeared to have been caused by bludgeoning with a heavy blunt object. The pathologist formed the opinion that the cause of death was severe head injury secondary to assault with a blunt instrument.
6. The witnesses who saw the body of the deceased at the scene of crime did indeed confirm that the deceased had an injury on the head and there was blood on the bed.
7. The remaining question is whether the prosecution has managed to link the demise of the deceased to all or any of the accused persons.
8. J K M who identified himself as a son of the deceased told the court that the deceased had two wives. A3 was one of the two wives and A1 and A2 were her children. In essence A3 was his step-mother and A1 and A2 were his step-sister and step-brother respectively. On 29<sup>th</sup> April, 2016 while preparing to go to work, A1 went to his house and reported to him that she had tried waking up the deceased without success. She further informed him that the deceased was bleeding from a wound on the head.
9. J K M proceeded to the scene where he found the deceased had died. The blanket was soaked with blood. He enquired from A1 and A3 about the time of the incident and they told him that they only discovered that the deceased had been killed at 7.30 a.m. They further informed him that the deceased was not drunk the previous night and they had left him in his house when they went to sleep in their house. He proceeded with A1 to Jaribuni Police Station where they reported the incident. Police officers visited the scene.

10. J K M testified that the deceased's relationship with the accused persons was good. The witness testified about an incident involving his step-brother A who was crippled. He told the court that A3 had asked the deceased to look for someone to treat A. The deceased called a pastor who prayed and revealed that the deceased was causing problems since he was sleeping with A1 and A3 at the same time. A later died.
11. J K M also talked of the children of A1 being paralyzed. When the elders were engaged they questioned the deceased. The deceased called a pastor who prayed for the children. The children became well but fell sick again. The matter was reported to the police who directed the deceased to treat the children. The deceased complied and the children became well and everything went back to normal up to the time the deceased was killed.
12. When cross-examined by the defence counsel, J K M stated that his house was about 150 metres from his father's house. He told the court that when he arrived at the scene A2 had already gone to work. He also stated that there were three houses in the homestead which was not fenced. One house belonged to the deceased. Another house belonged to A1 and the third house belonged to A2. J K M further told the court that the houses were searched by the police and no weapon or blood stained clothes were recovered. He insisted that he was not aware of any disagreement between the deceased and the accused persons.
13. A C G told the court that the deceased had disagreed with A1 because A1's children became crippled. The matter was reported to the D.O. A C G was present at the D.O.'s meeting. The deceased was directed to go and pray for the children. The deceased stated that he would bless the children and he actually did so.
14. A C G stated that he learned of the deceased's death at 8.00 a.m. Upon arrival at the homestead he saw the body of the deceased. J K M then went and reported the incident to the police.
15. Cross-examined, A C G stated that the deceased was his cousin. He stated that when he recorded his statement with the police he told them there were two issues that could have informed the killing of the deceased. The first issue was a land dispute between the deceased and the deceased's brother called F M T. The dispute was that both the deceased and his brother were selling portions of a piece of land they had inherited from their father at Maguguni area in Ganze. According to the witness, the deceased had a day prior to his death informed him that Festus had stopped him from collecting money from a purchaser he had sold a portion of the land to.
16. A C G gave the second issue that could have resulted in the killing of the deceased as the sickness of A1's children.
17. AP Sergeant Siraji was stationed at Jaribuni A.P. Post on 29<sup>th</sup> April, 2016 when at about 8.00 a.m. A1 and J K M went and reported to him the murder of their father. He booked the report and proceeded to the scene with another officer.
18. When they arrived at the scene he found the house had no door. The body was on the bed covered with a blanket inside a mosquito net. He telephoned the OCS and the DCIO who came to the scene.
19. When A1 was interrogated, she said that she had not heard any screams. She had been sleeping with A3 in a house which was 3.8 metres from the house the deceased was sleeping in. The house of A2 was 22 metres from that of the deceased. Sergeant Siraji talked of A2 having been seen chewing miraa on the night the deceased was killed.
20. Sergeant Siraji also talked of a report made in March by A1 at the D.O.'s office to the effect that the deceased had bewitched her children. A1 reported that she had informed the chief about the matter but no action had been taken. The witness told A1 to go to the office with the deceased the next day. They went there with the deceased, two elders and A1's brother. The witness advised A1 to take the children to hospital as the allegation of witchcraft was mere belief. The deceased said he was treating the children meaning "kuhasa" in Mijikenda. A1 said that is what she wanted and they went away.
21. During cross-examination Sergeant Siraji stated that no threat was uttered by anybody at the time the case of witchcraft reported by A1 was being discussed. He stated that he did not take any action as A1 was satisfied with the deceased's decision to "kuhasa" the children. The witness said that the accused persons were only suspects as he could not tell if they killed the deceased. He stated that he never heard about any land dispute.
22. Chief Inspector Raymond Malel investigated the murder. He corroborated the evidence of Sergeant Siraji. He took photographs of the scene and also took measurements and prepared a sketch map. He produced the photographs and the sketch map as exhibits. He also produced the mosquito net as exhibit.
23. As to why the investigating officer arrested the accused persons, his evidence was that he received information that the accused persons hated the deceased. He decided to arrest all the accused persons so as to interrogate them.
24. It was the evidence of C. I. Malel that investigations revealed that there was a time that the deceased had instructed A1 to take her disabled brother A to go and answer a call of nature. A1 declined the direction and the deceased told her that her children would be crippled like A. Later the two children of A1 became crippled and that is when the differences between the accused persons and the deceased started. The investigator further testified that he established that the deceased did not have disputes with anybody else. He was specific that the deceased had no land dispute with anybody.
25. It was also the evidence of the investigating officer that the accused persons were the only people with the deceased on the material night. J K M, who testified as a witness in this case, also told him that it had not rained the previous night. The witness also stated that he did not find any evidence of an intruder who could have killed the deceased and covered him with the mosquito net. The witness also testified that on the material night A3 was sleeping separately from the deceased. She had started doing so a week prior to the murder of the deceased. Further, that A2 had been seen warming himself by a fire in the homestead on the night of the murder.

26. From the evidence adduced, it is clear that the prosecution relies on circumstantial evidence in support of the case against the accused persons. For circumstantial evidence to lead to a conviction, it must satisfy three tests. The tests were set out by the Court of Appeal in **Abanga alias Onyango v Rep. CR.A. No. 39 of 1990 (UR)** which was cited in **Daniel Muthomi M'arimi v Republic [2013] eKLR** thus:

**“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:**

- i. the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;**
- ii. those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;**
- iii. the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”**

The evidence adduced by the prosecution was aimed at showing that due to the accused persons' proximity to the house in which the deceased slept it was almost impossible that an intruder would enter the house of the deceased and kill him unheard.

27. The evidence of the investigating officer was never supported by that of the other witnesses. The investigating officer stated that J K M told him it had not rained the previous night. J K M did not say anything about rain in his testimony. The investigating officer talked of A C G seeing A2 warming himself by the fire in the evening. A C G never gave such testimony. The investigating officer also talked of a woman who told him that she had heard the house of the deceased shake at about midnight. The woman did not record a statement.

28. Although the investigating officer denied being told of a land dispute, he admitted during cross-examination that A3 informed him of a land dispute. A1 also told him of a minor land dispute. I do not understand why the investigating officer downgraded the land dispute yet A C G was very clear that the land dispute was so serious to the extent that Festus the brother of the deceased had barred the deceased from collecting the purchase price from a purchaser of a portion of the family land.

29. Nobody saw the killers of the deceased. A search in the houses of the accused persons did not result in the recovery of any weapon or anything else that could have shown that they killed the deceased.

30. The homestead of the deceased was not fenced. The door to his house had no shutter. Not much can be read into the fact that A3 had vacated the deceased's bed a week prior to the murder.

31. Indeed the evidence adduced shows that although A1 had complained about the deceased bewitching her children, there was no expression of bitterness on her part. All she wanted was for her children to be healed. Indeed Sergeant Siraji stated that A1 was satisfied after the deceased accepted to treat her children. This evidence was confirmed by J K M who stated that the issue was resolved and there was no enmity between the deceased and the accused persons.

32. Looking at the evidence adduced, one cannot say that the evidence unerringly point to the accused persons as the killers of the deceased. Looking at the information dated 18<sup>th</sup> May, 2016, it is apparent that the prosecution also entertained uncertainties as to the killers of the deceased hence the claim that the accused persons committed the murder “jointly with others not before court”. There is likelihood that the deceased was killed by another person or other persons and not the accused persons. Placing the accused persons on their defence will be an exercise in futility.

33. In accordance with Section 306(1) of the Criminal Procedure Code, Cap. 75 I record a finding of not guilty against each accused person. Each accused person is thus set free unless otherwise lawfully held.

**Dated, signed and delivered at Malindi this 27<sup>th</sup> day of July, 2018.**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**