



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL CASE (MURDER) NO. 23 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

GEOFFREY LUBEMBE KHASIANI.....1ST ACCUSED

RODGERS ODUNGA SHIVEKHA.....2ND ACCUSED

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGEMENT

Introduction

1. GEOFFREY LUBEMBE KHASIANI and RODGERS ODUNGA SHIVEKHA (the accused) have been charged with the offence of *murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 of the Laws of Kenya*, the particulars of the offence being that on the 26th day of June 2012 at Shiseso Sub-location, Kakamega South District within Kakamega County jointly with another not before court murdered RICHARD ACHESA CHALUWA (the deceased). The prosecution called four witnesses in an effort to establish its case.

The Prosecution Case

2. PW1 Pius Shitsukane Shipanda (Pius) assistant chief of Shiseso Sub-location told the court that on 26th June 2012 at about 7.30 – 8.00AM he was going to his office when at a posho mill near his office he saw many people standing nearby while one person was lying down. As he got closer to the person lying down, he recognized the person as the deceased. He was crying as he had been assaulted and had injuries on his head, hands and feet. The injuries on his head were on the right side and both his hands and feet were swollen. The deceased told him he had been attacked in the night and that he knew three out of seven of his attackers. Pius stated that the deceased gave him the names of the three people as Shanza, Moi and Shiveko. Shanza and Moi are sons of Lubembe while Shiveko is the son of Pius. He also testified that there was no other Lubembe in the area with sons called Shanza and Moi neither was there another Pius in the area with a son called Shanza or Moi. That is why when the deceased gave him the names he knew the persons the deceased meant.

3. Pius then called the deceased's brother Silvanus Muhambi his father Simon Khalimwa who turned up at the scene. Upon arrival he gave them a note to go with to the hospital and advised them to make a report at Malaika Police Station. He then went to the office and at about 10.00am Thomas Shanza arrived at the office armed with a jembe and having a swollen face on the right side, to report that the deceased had attacked and injured him. He took possession of the jembe which he identified in court as PMFI-1 for it had a crack on the blade. Pius then gave Thomas a note to go to the hospital and advised him to report the matter at the police station. At about 5.00AM on 27th June 2012 Pius received a call informing him of the death of the deceased. On receipt of that report he called the OCS Malaika police station and informed him of the same. The OCS dispatched officers who proceeded to the home of Thomas, Geoffrey Khasiani and Rodgers but found none of them. They then proceeded to the home of the deceased and confirmed that he had died. The body was at the home.

4. PW2 Silvanus Muhambi Chaluwa (Silvanus) is a brother of the deceased. He confirmed receiving a call from Pius. When he got to the home, the deceased was in bad shape, with the flesh on his feet cut up to his thighs. Both hands were cut at the wrist, and he had a cut on the head. The eyes were pierced and bleeding. The deceased gave him five names of the people who he said attacked him, that is: Rodgers, Khasiani, Lubembe, Amunga and James. His Uncle Simon Kwalimwa together with Pius were present when the deceased was talking, but Pius was not present when the deceased gave him the names. He then carried the deceased on a wheelbarrow and took him to Shiseso Dispensary where he was treated before being referred to Kakamega PGH. He first took him home to be able to get fare and then went back to work. On the night of 26th/27th he got information that his brother had died at about 4.00AM. He later identified the body for post-mortem examination.

5. PW3 Simeon Kwalumwa Andakalwa (Simeon) is uncle to deceased. He corroborated the testimonies by Pius and Silvanus. After receiving the call from Pius, he rushed to the scene and found the deceased in critical condition. The deceased told him that at about 8.00PM he was cooking when people entered his house. The first three persons were Thomas Shanza, Geoffrey Khasiani and Rodgers Odunga but there were 7 men in total. They removed him from the house and started walking with him along the road while assaulting him. He managed to hit Thomas Shanza on the right hand side of the face. Simeon together with Pius took the deceased to the local hospital but were advised to take him to Kakamega PGH. They took him home first to make arrangements for transport, but at about 4.00AM at night the deceased died.

6. PW4 was Dr. Dixon Mchana Mwaludindi Kakamega County pathologist. He conducted the post mortem examination on the body of the deceased on 2nd July 2012. Externally the body had multiple non-extensive injuries on the scalp, face, both front and back trunk and both legs. There were whip marks on the back and lacerations on fore- arms and legs. The whip marks were less than 2 days old. The deceased's fingertips, lips, tongue and eyes were all blue in colour. There were defence injuries as well. There was evidence of medical intervention namely dressing and tape on the limbs. The body had blood clots under the skin in the chest but no fractures. There was a lot of bleeding under the skin in the abdomen and in both kidneys. There was very little urine in the bladder which would imply shock. There was a blood clot under the scalp above the right ear but there was no bleeding inside the scalp though the brain was swollen. Consequently, Dr. Mchana opined that the cause of death was extensive soft tissue injury secondary to blunt force trauma secondary to assault. He produced the post mortem report which was marked PExh. 2. He filled permit no. 227255. He also took some blood sample from the deceased and handed it over to the investigating officer for DNA matching.

The Defence Case

7. When put on their defence the accused persons gave sworn testimony and called one witness. DW1 Geoffrey Ikhunyalu Lubembe, 1st accused person, denied the allegation of murder, stating he only learnt about it on 19th May 2014 when he was arrested. On that day he was at the shamba of Sevenzi Khasatsili weeding maize. At about 9.30AM people armed with pangas and axes entered the shamba and started cutting trees. Among the people were one Boaz Ashiono and Godwin. He went and reported the matter to Sevenzia and then went back to the shamba after five minutes where he found the people he was working with – namely Ikura, David, Geoffrey Ashiono and 2nd accused- had apprehended Godwin. They took him to Sevenzia together with the felled trees. She called the assistant chief, Pius, who advised her to take Godwin to his office. They did so. He later advised them to take Godwin to Malakia Police Station. When they got to the police station, Godwin was put in the cells but they were told to wait until 3.00PM when they were to record their statements. At 3.00PM, he together with his co-accused were ushered into a room and locked inside. Sevenzia was not placed in the cells. He looked through the window which had wire mesh and saw a man carrying an envelope which he gave to the OCS then the man left while laughing. The young man was Felix Muswanyi who is his cousin. The envelope was an A4 khaki envelope but he did not know what was in it. Felix took the envelope to the office of the OCS but he could not see inside the office. He saw the OCS, Mugo and Felix enter the office together but he could not tell who exactly between the OCS and Mugo received the envelope. He did not know whether the envelope contained a bribe.

8. The 1st accused stated further that on 21st May 2014 they were taken to Malinya CID where they were informed that they had killed somebody but they were not told when they committed the offence. An order was made to take them to Kakamega police station. It was the 1st accused person's evidence that it is the assistant chief Pius who knows the people who killed the deceased, and further that both Pius and Silvanus did not mention his name. He stated that from 2012 to 2014 he was at home throughout and could not tell why he was not arrested during those years. He produced his department of social development card issued to him in 2010 which confirmed that he lived at home (DExh – 1). He also confirmed that he did not know the deceased or the other witnesses brought to court apart from Pius, who he has no grudge with.

9. DW2, the 2nd accused gave his name as Rodgers Otunga Shibeka. He reiterated exactly what DW1 had told the court. He also produced his department of social development card (DExh 2). He declared that on 26th June 2012 he worked in his shamba the whole day and then went to sleep. He had no information concerning the death of the deceased neither does he know who killed him. He affirmed that he does not know the prosecution witnesses apart from Pius. Further, that his name was not mentioned by any witnesses neither did the witnesses tell the court they saw him and his co-accused kill the deceased.

10. DW3 Sevenzia Khasatsili corroborated what was stated by DW1 and DW2. She affirmed that the accused persons have continuously lived at their homes throughout. That she had never heard of any murder charge against them. Neither has she heard that anyone had been murdered in her area. That they are before court because of a land dispute involving her land. She also stated that she had no grudge with Pius. She asserted that she does not know the deceased.

Submissions

11. In their written submissions, the accused persons submitted that there is no tangible evidence that they had any interaction with the deceased either prior to or on the material day. Further that there is no concrete evidence as to whether they were acquaintances, enemies or had any reason to quarrel or fight. That the evidence adduced by Pius, Silvanus and Simeon was not consistent and had glaring discrepancies thereby throwing their credibility in doubt. Defence counsel relied on several authorities such as *Ndungu Kimanyi v Republic [1979] KLR 282*, *Musa Njuguna Gachuru and Others v Republic [1962] EA 673* and *Kihara v Republic [1968] KLR 473*, for the proposition that the credibility of witnesses is crucial in determining whether the case about which such witnesses have testified stands or falls, and where the court doubts credibility of a witness, the evidence of such witness should be rejected.

The Law

12. The offence of murder is defined as follows by Section 203 of the Penal Code:

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

13. From the definition, the key ingredients of murder that need to be proved beyond reasonable doubt by the prosecution are:

1. The fact of the death of the deceased

2. The cause of such death

3. Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons, and lastly

4. Proof that the said unlawful act or omission was committed with malice aforethought.

Analysis and Determination

14. The first and second issues relate to the fact and cause of death. According to the prosecution witnesses the deceased was assaulted before he met his death. This was confirmed by Dr. Mchana and the post mortem report produced as Pexhibit 2 which showed that the cause of death was extensive soft tissue injury secondary to blunt force trauma secondary to assault. The injuries suffered by the deceased were not self-inflicted but were inflicted on him by another person (s). In addition, Dr. Mchana testified about the presence of defence wounds on the deceased's body. Therefore, I am of the view that the fact and cause of death of the deceased have been satisfactorily proved.

15. With regard to the third issue, the prosecution has to establish that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons. According to Pius and Silvanus, when they asked the deceased who attacked him he mentioned the accused persons together with one Thomas Shanza as the people the deceased could identify. Simeon confirmed this when he told the court that when the deceased was telling Silvanus who had attacked him he (Simeon) was standing on the side and he could hear the conversation.

16. Under the law, **Section 33 of the Evidence Act**, permits the admissibility of statements made by a deceased person relating to the cause of his death. The section reads:

“33. Statements, written or oral, 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 and 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;

...”

17. In spite of the above provisions, courts are alive to the danger of basing a conviction solely on dying declarations which must always be received with caution. This was the position held by the Court of Appeal in the case of ***Philip Nzaka Watu v Republic [2016] eKLR*** where it expressed as follows:

“Notwithstanding section 33(a) of the Evidence Act, courts have consistently held the view that evidence of a dying declaration must be admitted with caution because firstly, the dying declaration is not subject to the test of cross-examination and secondly, circumstances leading to the death of the deceased such as acts of violence, may have occasioned him confusion and surprise so as to render his perception questionable. While it is not a rule of law that a dying declaration must be corroborated to found a conviction, nevertheless the trial court must proceed with caution and to get the necessary assurance that a conviction founded on a death declaration is indeed safe. This Court expressed itself as follows in ***CHOGE V. REPUBLIC (supra):***

“The general principle on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful considerations to tell the truth. In Kenya, however the admissibility of dying declarations need not depend upon the declarant being, at the time of making it, in a hopeless expectation of eminent death. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person.”

18. Pius stated that the deceased gave him three names: Shanza, Moi and Shiveko as the people who assaulted him. That Shanza and Moi are sons of Lubembe while Shiveko is the son of Pius. He averred that the deceased mentioned Moi Lubembe and that is how he knew Moi is the 2nd accused. That there is no other Lubembe who has sons called Moi or Shanza. On his part, Simeon acknowledged that in the statement he made to the police on 26th June 2012 he stated that the deceased gave three names, that is Thomas Shanza, Moi and Shiveka, while in the court he gave the names as Thomas Shanza, Rodgers Shiveka and Geoffrey Khasiani. He admitted the names given in court are different from what he recorded. Silvanus on the other hand stated that the deceased named his attackers as Rodgers, Khasiani, Lubembe, Amunga and James.

19. If indeed the deceased declared who attacked him, why then did it take two years to arraign the accused in court taking into consideration they had not fled their homes? No evidence was adduced by the prosecution to establish that the accused had fled or demonstrated whether

proper investigations were conducted to establish that the names uttered by the deceased pointed to the accused persons given that the evidence is wanting. When one looks at the names of the accused persons and the names allegedly uttered by the deceased there is no similarity, especially in view of the fact that there might be other people with similar names such as Godwin Shiveka whom Pius said was known to him. In my considered view, the dying declaration raises doubt and evidence adduced does not help to clear the doubt. This doubt must of necessity go to the benefit of the accused persons. This being a criminal matter the prosecution has the burden to prove its case beyond reasonable doubt, a burden which they failed to discharge. The prosecution has failed to prove that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons. Resultantly, the prosecution also failed to prove that the said unlawful act or omission was committed with malice aforethought.

Conclusion

20. From the foregoing, I am satisfied that the prosecution have failed to prove their case against the two accused persons beyond reasonable doubt. Therefore, I find Geoffrey Khasiani Lubembe, 1st accused, and Rodgers Odunga Shiveka, 2nd accused, not guilty of the murder of Richard Achesa Chaluwa and accordingly acquit them ***under section 322(1) of the Criminal Procedure Code.***

21. Unless otherwise lawfully held each of them is to be released from custody forthwith.

It is so ordered.

Judgment written and signed at Kapenguria.

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Kakamega on this 26th day of October, 2018.

J. NJAGI

JUDGE

In the Presence of:

Mr. Ngetich for State

Mr. Munyendo holding brief for Mukhwana for Accused

George – Court Assistant