



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL DIVISION
CRIMINAL CASE NO. 20 OF 2010

REPUBLICPROSECUTOR

VERSUS

EDWIN WIJENJE KHAVUSE.....1ST ACCUSED

PETER JOSHUA LIMINAJI.....2ND ACCUSED

EDWIN MATSAVELO ANYULA.....3RD ACCUSED

EDWIN M'MAYI ADOVE.....4TH ACCUSED

J U D G M E N T

Introduction

1. According to the information dated 27th July, 2010, the 4 accused persons named above were charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code, the particulars being that on the 13th day of July, 2010 at Sisaba Village Elungoto Sub-Location Shibuye Location in Kakamega East District within Western province, jointly murdered Daniel Mbalilwa Moi. They took plea on 18th October, 2010 and each denied the charge. The case was then set down for hearing and has been ongoing since.

The Prosecution Case

2. The prosecution called 6 witnesses. Briefly the prosecution's case is that on 12th July, 2010 at about 11.00pm, the deceased herein was a sleep in his two roomed house together with his wife Laura Alisa who testified as PW1 when they heard a young girl crying for help. The deceased got up and went outside the house to check what was happening and soon thereafter, PW1 heard her husband crying. She also got up, took a torch and went outside the house. She saw three men among them the two accused persons. The 3rd accused was knocking on PW1's father-in-law's house while two others emerged from the rear of the deceased's house, but as soon as the 3rd accused saw PW1 he ran away. PW1 flashed the torch light at the other two. At that point Nancy Shikami PW2, came out of her, father's house but immediately the two people who had emerged from behind the deceased's house went straight for her. She quickly turned back, ran into her father's house and bolted the door behind her. The two people also ran away.

3. After the attackers had all left, PW1 and PW2 started looking for the deceased. They eventually found him behind the house. The deceased's body was covered in blood and he had many cut wounds on the head. Both PW1 and PW2 screamed, neighbours rushed to their rescue, but the attackers had left. Some of the neighbours assisted to take the deceased to hospital. The Assistant Chief of the area was informed. The Assistant Chief did not testify.

4. Dr. Dickson Mchana Mwaludindi who testified as PW5 performed the post mortem examination on the body of the deceased. The examination revealed that the cause of death was cardiopulmonary arrest secondary to severe head injury and excess blood loss. The Post mortem report was produced as PExhibit. Number 33167 Police Constable Moses Mungai who testified as PW6 was the Investigating Officer. He told the court that though the accused persons herein were charged with the murder of the deceased, another set of suspects who had been arrested earlier were released and ordered to keep the peace. PC Mungai's statement was produced in court as DExhibit 1.

Defence Case

5. At the close of the prosecution case, defence counsel submitted that there was no evidence linking the 4th accused to the offence. He urged the court to acquit the 4th accused under the relevant provisions of the law. Counsel referred to Section 210 of the CPC but the proper Section is 306(1) of the CPC. Counsel left the court to determine whether or not the 1st – 3rd accused persons had a case to answer. Counsel for the state relied on the evidence on record, while concurring with defence counsel that there was no evidence linking the 4th accused to the crime.

6. In his ruling dated 5th November, 2014, Hon. Mr. Justice A.C. Mrima acquitted the 4th accused, Edwin M'Mayi Adove under the provisions of Section 306(1) of the CPC. The 1st - 3rd accused were found to have a case to answer and were put on their defence.

7. All the accused persons elected to give sworn evidence. Testifying as DW1, Edwin Wijenje Khavuse denied any involvement in the murder of the deceased, stating that on the night of the alleged murder, he was at his home sleeping. He also told the court that all the evidence tendered against him was false and that PW6, the Investigating Officer never told the court that he (1st Accused) was involved in the murder. He urged the court to acquit him.

8. DW2, Peter Joshua Liminaji, 2nd accused also denied any involvement in the murder of the deceased, his case being that on the material night, he was at home when the police arrested him on allegations that he was one of the people who had killed the deceased. DW2 also testified that the investigating officer, PW6, did not carry out any proper investigations into the case and instead relied on hearsay evidence to arrest him and incarcerate him for 3 months before taking him to court.

9. The 3rd accused, Edwin Anyula Matsavelo denied any involvement in the murder, saying that he was at his home asleep when the alleged murder took place. He was arrested around 5.00am on 14th July, 2010 though the investigating officer had not been given his (3rd accused's) name. He also denied being in the company of the 1st and 2nd accused persons on the material night.

Final Submissions

10. At the close of the case defence Counsel, Mr. Aburili made very detailed. Written submissions. I have carefully read the same. He also made oral submission by way of highlighting the written submissions. Counsel for the state relied on the evidence on record.

Issues for Determination

11. Sections 203 and 206 of the Penal Code set out the ingredients to be proved by the prosecution before a court can make a finding in their favour. These are:-

- a) Death and cause of death of the deceased.
- b) Connection between the death of the deceased and the unlawful acts or omissions of the accused person(s)
- c) Presence of malice aforethought in the actus /omissions of the accused(s)

Burden and standard of proof.

12. Before I move on to determine the issues, it is worth noting that in all criminal cases, and as provided under Section 107(1) of the Evidence Act, the burden of proof is always on the prosecution and never shifts to an accused person. The law is clear that he who asserts must prove. This was the position stated by the High Court (Etyang J) in the case of **Republic – Vs- Nyambura [2001]KLR 355.**

13. Although this is a persuasive authority, it is good law. In the case, five accused persons were charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. It was alleged that on 15th May, 1999 at Dandora Estate in Nairobi jointly with others not before court, they murdered Joseph Kinyanjui Njiru. There was evidence that the five accused persons were members of the matatu association whose members were said to have murdered the deceased. There was however no direct evidence placing them at the scene. All the accused persons, like the 3 accused persons in the instant case pleaded the defence of alibi. The court held, and I agree that---

1. It is a cardinal principle of law that in a criminal case, the legal onus is always on the prosecution to prove the guilt of an accused person and the standard of proof.
2. An accused person does not assume any burden to prove his innocence in a criminal case. He is obliged, only if he so wishes to give an explanation or to raise a defence to the charge, which is probably or possibly true. If he does this then he discharges his burden of proof and his explanation or defence must be accepted.
3. There are three ingredients of murder which the prosecution must prove beyond reasonable doubt so as to have a conviction, namely;
 - a) The death of the deceased and cause of that death;
 - b) That the accused committed the unlawful act which caused the deceased's death
 - c) That the accused had malice a forethought

Analysis and Determination

a) Whether the prosecution has proved the death and cause of deceased's death

14. There is sufficient evidence on record showing that the deceased died PW1 and PW2 who are wife and sister of the deceased testified to the fact that the deceased died as soon as he landed at Mukumu Mission Hospital. The two of them also testified to the fact that after post mortem examination on the body of the deceased on 17th July, 2010, the body of the deceased was released to them for burial and they buried it. Even PW6, the investigating officer testified that through he found the deceased still alive when he went to the deceased's home accompanied by other officers, at about 5.00am on 14th July, 2010, the deceased succumbed to the injuries within 30 minutes of arrival at Mukumu Mission Hospital.

15. PW5, Dr. Dickson Mchana Mwaludindi on behalf of Dr. Duncan Nyikuri produced the post mortem report dated 17th July, 2010 duly stamped and signed by Dr. Nyikuri. The doctor's opinion was that the cause of death was cardio pulmonary arrest secondary to severe head injury and sever hemorrhagic anemia. It was indicated during the testimony of Dr. Machana that the deceased had suffered several

sever and deep panga cuts on the back side of the head, and that one such cut fractured the skull and exposed brain matter. The deceased had bled profusely after the cuts were inflicted on him. I therefore conclude that the prosecution has proved the death and the cause thereof beyond any reasonable doubt.

b) Whether it is the accused person who committed the unlawful acts which caused the deceased's death

16. The evidence purporting to link the accused persons to the death of the deceased is that of PW1, PW2 and PW6. Both PW1 and PW2 claimed that they knew the accused persons well because they were all neighbours, and that they were in close proximity to all the accused persons on the fateful night when they recognized all the three accused persons at the scene. The question of identification/recognition of an assailant, especially during difficult conditions is a perennial one, and the courts have set out the parameters to be considered before a court accepts visual identification and a basis for conviction. In **Nzaro – vs – Republic [1991] 2 KAR 212**, the court held, inter alia, that

1. Before accepting visual identification as a basis for conviction the court had a duty to warn itself of the inherent dangers of such evidence.

2. A careful direction regarding the conditions prevailing at the time of the identification and the length of time for which the witness had the accused person under observation together with the need to exclude the possibility of error was essential.

17. **In Odhiambo – vs – Republic [2003]KLR 241**, the court held as follows;-

1) The court should receive evidence of identification with the greatest circumspection particularly where circumstances are difficult and did not favour accurate identification. See also **Wamunga & others – vs – Republic [1989]KLR 424**, in which the Court of Appeal sitting at Kisumu, and citing the case of **R-vs – Turnbull [1976] 3 ALL ER 459**, said that though recognition of relatives and close friends is much easier than identification of strangers, the courts are still under a duty to exercise caution because mistakes have been known to be made when recognizing such close relatives or friends.

18. In the instant case, PW1 stated that it was 11.00pm when she went out of her house in search of the deceased when she heard crying. She stated in part of her evidence in chief;-

“ I took the torch and went out. I saw three young men outside when I flushed the torch light. The torch light enabled me to see well. I saw three men. One of them was knocking on the door of my father in law. Another came from behind the house to where I was. I flushed the light on him. He ran back and jumped over the fence.” Matsavelo is the one I saw knocking on my father in law's house. He turned towards me when I flushed the light and I saw his face.”

19. During cross examination, PW1 had the following to say regarding her recognition of the accused persons and the attack on her husband;-

“I witnessed the actual attack of my husband. The attack took place outside our houseand the attack took place on the rear of the house just next to the wall of the house. The door of our house is on the side of the house and I saw my husband. I don't know how long the incident took the entire incident took place about half an hour. ----- when I flashed the torch on the 3rd accused, he ran away quickly. I saw the face of the 3rd accused and recognized him but the 1st and 2nd accused ran away from the direction where the body of my husband lay then ran towards our gate.”

20. Counsel for the accused persons submitted that such evidence as given by PW1 cannot form the basis of a conviction because it is both inconsistent and contradictory. I have myself carefully examined the evidence, portions of which I have quoted above and the conclusion, I have reached is that the said evidence is inconsistent and contradictory. In the first place, PW1 alleges in one and the same breath that she could not say how long the incident took and yet she says it took about half an hour. I also find that

the time PW1 had to observe the assailants was only a fleeting moment and PW1 confirms this where she said 1st and 2nd accused ran away quickly the moment she flashed the torch at them. Further, there is no indication of the strength of the torch light which she alleged enabled her to see the 3rd accused clearly, nor is there any indication of whether or not there was any moonlight on the material night or it was pitch dark. In my considered view the lack of clear evidence on the strength of PW1's torch light and the fact that she did not have sufficient time to observe the accused persons casts some doubt on the veracity of her claims.

21. PW1 also claimed during cross examination that she saw the actual attack on her husband; but she made no such statement during her evidence in chief. In fact it is clear from the rest of her evidence that they had to search for the deceased after the assailants left. If she had truly witnessed the actual attack, there would have been no reason for her and her sister in law to begin to look for the deceased after the assailants left. In brief the inconsistencies and contradictions in PW1's evidence throw her credibility into question and there is therefore a likelihood that most of her evidence was made up.

22. In the case **of Ndungu Kimanyi – vs Republic [1979]KLR 282**, cited by counsel for the defence in his submissions, the court said the following about such evidence as the one given by PW1;-

“The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression, in the mind of the court that he(she) is not a straight forward person or raise a suspicion about his(her) trustworthiness or do (or say) something which indicated that he(she) is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his(her) evidence.”

23. There is also the evidence of PW2 she stated the following in part of her evidence in chief.

“ I went out I flashed a torch I saw the three above home coming from behind my late brother's house.-----after I flashed my torch light I saw Khavuse the first accused pull the 2nd accused (identified) and Matsavelo the 4th accused (identified). ----- when I had seen accused 1- 3 come from behind my brother's house towards me. I ran back into the house and locked it.”

24. In cross examination, PW2 alleged to have seen three accused persons though she did not see exactly what each of the accused was carrying then she added,” when I flashed the torch light on the accused persons, they started running towards me and I ran towards my house.”

25. What comes out of PW2's testimony is that she did not have any or any sufficient time to observe any of the assailants, for as soon as she flashed her light on them, they started running towards her and in response she [turned] and started running away to her house and she states that “it was God who saved me because they were left knocking at the door saying I sleep or they kill me.” Though both PW1 and PW2 said to have recognized the voices of the three accused persons, they did not tell the court how well they knew the accused person's voices. Again there is some doubt as to whether PW1 and PW2 did recognize the three accused persons by voice. PW2 also confirms my earlier conclusion that PW1 could not have seen the actual attack on the deceased when she said, “we looked around the compound for about five minutes before we saw the body of my late brother.----- we looked for my brother after the attacker's left.”

26. From the above analysis, it is clear to my mind that the prosecution has not proved beyond doubt that the accused persons committed the unlawful acts which caused the death of the deceased.

c.) whether the accused had malice aforethought

23. Having reached the conclusion that the prosecution has failed to prove the second ingredient of murder, I am of the view that it would only be an academic exercise for his court to delve into the third ingredient of whether or not the accused persons had malice aforethought as defined under Section 206 of the Penal Code.

Conclusion

27. In conclusion, I find and hold that the prosecution’s case against the accused persons must fail as the same has not been proved beyond any reasonable doubt. I therefore find each of the three accused persons not guilty of the murder of Daniel Mbalilwa Moi and acquit them under Section 322(1) of the CPC.

28. Unless there is any other reason for holding either all or any one of them in custody, they are to be released from prison custody forthwith.

It is so ordered.

Judgment delivered, dated and signed in open court at Kakamega this 28th day of February, 2017

RUTH N. SITATI

JUDGE

In the presence of;-

Mr. Ng’etich (present).....for state

Mr. Aburili (present).....for all 3 accused

Polycap.....Court Assistant.