



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL CASE NO. 26 OF 2015

REPUBLIC.....PROSECUTOR

Versus

1. SAMUEL KILELE MUSEMBI

2. BONIFACE MAKAU PETER.....ACCUSED

JUDGEMENT

SAMUEL KILELE MUSEMBI and **BONIFACE MAKAU PETER** hereinafter referred as the 1st and 2nd accused person were charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. Briefly the particulars of the offence as per the charge sheet dated 9/10/2014 are that on the night of 28 and 29/9/2014 at Kimana-Oloile village the accused persons had visited the deceased N. M in her house. It was in the said house where the deceased body was discovered lying dead on her bed.

As the accused persons were the last persons to be seen with the deceased, investigations launched led to their arrest and indicted with the death of the deceased. During the time of plea, each of the accused denied the offence and any particulars associating them with the crime. At the trial Mr. Morara counsel represented the 1st accused while Mr. Sekento advocate represented the 2nd accused. The prosecution was conducted by Mr. Alex Akula, the senior prosecution counsel.

In order to substantiate the charge against the accused persons the prosecution adduced evidence from thirteen witnesses and a bundle of documentary exhibits. From these witnesses the summary of each testimony is herein outlined as follows:

PW1 M. M the mother to the deceased and a neighbour testified that in the morning of 29/9/2014, PW5 K. had gone to her house to pick a razor blade for shaving. This razor blade according to PW1 was to be used by the deceased to shave PW5 before he goes to school. Before long PW5 again came back to the house of PW1 asking her to accompany him to the deceased house. When PW1 and PW5 arrived in the deceased house they observed and confirmed that her body was motionless with no life. PW1 further stated on how she raised an alarm by calling other neighbours to assist in uncovering what must have happened to the deceased. The complaint about the deceased death was also filed with the police. It was further the testimony of PW1 that a quick interrogation of the deceased children who testified as PW2 and PW4 gave her names of Makau and Samuel as the men who were in company of the deceased previous night.

PW2 N.M. a minor and daughter to the deceased testified that on 28/9/2014 they spent the rest of the day attending to domestic chores. According to PW2 later in the day the accused persons came to their house

where they spent time chewing miraa. It is further her testimony that when time reached for them to retire to bed the deceased went to her room leaving the two accused persons still seated in the living room. According to PW2 they were to inform the deceased when they were done so that she could wake up to lock down the door. PW2 further alleged that she also went to sleep leaving the two accused persons together in the room. According to PW2 testimony the two accused persons joined them later in the same bedroom. In this respect PW2 further testified that she asked his brother PW4 to put on the lights but the 1st accused kept on putting it off. That 'game' of lighting the lamp and being extinguished by the 1st accused went on for a while until the march sticks got finished. PW2 stated that she decided to wake up her mother but she was not responding. On inquiry from the 1st accused what must have happened to the deceased the 1st accused insisted that she be left in the meantime as she is in deep sleep. According to the testimony of PW2 she woke up about 6.00 am and went to prepare tea in the kitchen. That is the time she told this court that the 1st accused walked out of the house and never returned. In the evidence of PW2 she did not know when the 2nd accused left the house. Therefore in the testimony of PW2, PW4 and PW5 they decided to report this matter to PW1 regarding the previous night, involvement of presence of the accuseds in their house and subsequently death of their mother – the deceased. The police commenced investigations and as per PW2 testimony she was asked to participate in an identification parade conducted by PW12 C.IP Gichohi.

According to the testimony by PW12 in the identification parade conducted on 8/10/2014 PW2 managed to positively identify the 1st and 2nd accused persons. The two parade forms were admitted in evidence as exhibit 3 (a) (b) respectively.

The police detective PW13 IP Munga took over the investigations of the case. Pursuant to several leads, recording of statements from witnesses, conducting of the postmortem by PW3, the piece of evidence from the identification parade PW13 preferred a charge of murder against the accused persons.

As for PW6 Peter Musa a brother to the deceased testified on receipt of the death report in the morning of 29/9/2014. He went to the house of the deceased and among other people present confirmed the death. PW6 had to involve the police who in turn collected the body of the deceased from the scene. It was further PW6 testimony that he was asked by the police to identify the body of the deceased to the pathologist for purposes of postmortem report. This PW6 confirmed was done on 30/9/2014 in company of PW6 was PW7. PW7 Ekusi Lengusek father to the deceased testified the role he played to identify the body of the deceased with PW6 to the pathologist at Loitokitok Hospital Mortuary.

PW8 Somoire Ole Apapa deposed that he knew the deceased as a neighbour and as one he could engage on several occasions to do manual jobs for him at a pay. According to PW8 he used to see the two accused persons visit the deceased from time to time in her house. That one such normal incident was on 28/9/2014 when he passed through the deceased house and saw the two of them chewing miraa at about 6.00 pm. In further evidence by PW8 in the morning of 29/9/2014 while in his house asleep he heard screams from the deceased house indicative of her death. This led him to join hands with the rest of the neighbours and members of public in searching for the two accused persons as suspects to the murder of the deceased.

PW9 Henrey Kiptoo a government chemist informed the court on the analysis he did at the laboratory on the blood samples of the 1st and 2nd accused with the blood sample of the deceased and her vaginal swab. The request was for determination of seminal stains on the vaginal swab. As regards this request PW9 testified that there were no positive findings from the sample. The report was admitted in evidence as exhibit 2 (a).

PW10 PC Martine Munene of Kimana Police Station was one of the first officer to visit the scene of murder. PW10 further stated on the role he played to transport the deceased body from the scene to the mortuary where a postmortem was conducted in the presence of family members PW6 and PW7. It was also his evidence that the suspects accused persons before were subsequently arrested in connection with the murder of the deceased. This was corroborated by PW11 C.IP Nyangares Libao.

PW3 Dr. Mwongela examined the deceased body and came up with the postmortem report exhibit 1. The positive findings from the autopsy report presented by PW3 consisted of:

- Small petechial on abdominal wall, neck hyper mobile with pseudojoint extending beyond normal range of motion, signs of vaginal penetration – abrasions in the vaginal walls
- Bloody rhinorrhea
- Sub-galeal hematoma on the occipital region.
- Extradural and subdural haematoma
- Base of skull fracture
- Hematoma on the neck with fractured C4 – C5.

According to PW3 opinion the cause of death was respiratory depression due to fractured neck and base of skull secondary to blunt force trauma.

At the close of the prosecution case each of the accused persons was placed on his defence under the provisions of section 306 (2) of the Criminal Procedure Code. The 1st accused elected to give a sworn testimony. The accused denied throughout on the evidence touching on the night of 28/9/2014 and 29/9/2014 to have participated in killing the deceased. The accused objected to the evidence of PW1 and PW2 which appeared to place him at the scene of the crime. The 1st accused denied knowledge of the deceased and the evidence that he knew the 2nd accused person prior to the incident. On his part the 2nd accused also denied the charge. According to the 2nd accused on the material day he did not go to the deceased house nor was the deceased his girlfriend. The accused maintained that the evidence by PW2 implicating him with the death was false.

It was submitted by the defence that the offence of murder was not proved beyond reasonable doubt. It was also submitted that PW2 and PW3 never saw the accused persons murder the deceased. The evidence according to learned counsel was merely circumstantial evidence of whose connection with the accused only provides a remote possibility.

On that alone learned counsel contended that the accused persons should be acquitted of the offence.

This court has considered the evidence admitted in its entirety by the prosecution and the answer to the charge by each of the accused persons.

First and foremost is to set out the ingredients of the offence of murder contrary to section 203 of the Penal Code which the prosecution are required to prove beyond reasonable doubt:

- 1. The death of the deceased Namunyak Meele.**
- 2. That the death of the said deceased Namunyak Meele was unlawful.**
- 3. That in causing the death of the deceased the assailant's acts were accompanied with malice aforethought.**
- 4. That according to the prosecution the two accused persons before court are the ones responsible for the death of the deceased.**

The standard of proof which lies on the prosecution as urged by Lord Stanley L.C. in the case of Woolmington v DPP [1935] AC 485 is not proof to the hilt or as by Lord Denning J in Miller v Minister of Pensions [1947] 3 ALL ER 373. It is not proof beyond an iota of doubt. Closer home the Court of Appeal in the case of Joseph Kamau Njau v Republic [2014] eKLR held thus:

“In all criminal trials, both the actus reus and the mensrea are required for the offence charged. They must be proved by the prosecution beyond reasonable doubt. The trial court is under a duty to ensure that before any conviction is entered, both the actus reus

and the mensrea have been proved to the required standard.”

It is against this background i proceed to consider each singular ingredient alongside the evidence by the prosecution.

1. Death of the deceased:

In homicide cases death is at the core of the charge and must be proved beyond reasonable doubt. See *Nyamhanga v Republic [1990-1994] EA 462* as was observed in the case of *Cleya v Republic [1973] EA 500* proof of death is usually through medical evidence although that is not the absolute rule as the law also provides for presumption of death that is by way of cogent and credible circumstantial evidence. This being an offence where a life of another human being was lost and the state alleges that someone else was the cause, then evidence to prove that fact by the prosecution becomes necessary.

As regards this ingredient the deceased body was examined by PW3 Dr. Mwongela. The postmortem produced as exhibit 1 indicated that the deceased sustained multiple injuries, more specifically evidence existed of sexual assault. The cause of death as per PW3 was as a result of respiratory depression due to fractured neck and base of the skull. This evidence is corroborated by the testimony of the mother PW1, the daughter to the deceased PW2, PW4 a son to the deceased, PW6 Peter Musa a brother and Ekusi Lengusek (PW7) father to the deceased are all categoric that N. M died on the night of 28-29/9/2014.

I therefore find that the prosecution adduced both medical and circumstantial evidence to prove the death of the deceased beyond reasonable doubt.

2. That the cause of death of the deceased was unlawful:

This ingredient involves an element of acts of omission or commission on the part of the offender whose consequence result in death. Sausation of death and circumstances upon which an offender is held liable for the death of another are defined under section 213 of the Penal Code it includes:

- a. Where he inflicts bodily injury on another person and as a consequence of that injury the injured person undergoes a surgery or treatment which causes his death.**
- b. He inflicts injury on another which would not have caused death if the injured person had submitted to proper medical or surgical treatment or had proper precautions as to his mode of living.**
- c. He by actual violence threatened violence causes such other person to perform an act which causes the death of such person, such an act being a means of avoiding such violence which in the circumstances appeal natural to the person whose death is so caused.....**
- d. His act or omission would not have caused death unless it had been accompanied by an act of omission of the person killed of other persons.**

The general principle of law is that every homicide is unlawful unless it is authorized or excusable by law. See *Gezambizi S/O Wesonga v Republic [1948] 15 EACA 65*. From the evidence the deceased was alive in her house in company of her children PW2 and PW4. The deceased at an appropriate time within the night went to sleep and her children followed shortly thereafter. In early hours of 29/9/2014 the deceased never woke up and all efforts by PW1, PW2, PW4 and PW5 to have her rise up from asleep bore no fruits. The police officers who testified as PW10, PW12 and PW13 visited the scene and confirmed the death of the deceased. The nature of injuries as depicted by PW3 evidenced the cause of death. PW3 traced the cause to multiple injuries to the head, nervous system and spinal column. The acts of rape committed against the deceased would not have occasioned death perse but for acts of omission to cause death or grievous harm. The prosecution has placed before this court evidence to demonstrate that the deceased body sustained multiple injuries from which he suffered death.

I am therefore of the holding that from the injuries the death of the deceased was unlawful.

3. The ingredient on malice aforethought:

Malice aforethought is the *mensrea* of the offence of murder under section 203 of the Penal Code. This is defined under section 206 of the Penal Code to include the following:

- a. An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not.**
- b. Knowledge that the act or omission causing death will probably cause death or grievous harm to some person, whether that person is the person killed or not, accompanied by indifference whether death or grievous injury occurs or not or by a wish that it may not be caused.**
- c. An intention to commit a felony; and**
- d. An intention to facilitate the escape from custody of or the flight of any person who has committed a felony or attempted it.**

The provisions of section 206 underpins that for the prosecution to prove malice aforethought the offender action must be brought within the rubric of intent to cause the death, or grievous harm or had the necessary knowledge that his acts of omission or commission will result in death of a person or occasion grievous harm.

As the requisite, intention of man is not very easy to read. Courts have devised set of circumstances upon which to draw an inference on malice aforethought. This is in accordance with the principles laid down in the following cases in *Republic v Tubere S/O Ochen [1945] 12 EACA*. The predecessor of the Court of Appeal held that the question whether an unlawful act constitutes malice aforethought can be determined from the weapon used, the manner in which it is used and the part of the body injured. In the case of *James Masomo Mbatha v Republic [2015] eKLR* it was further held:

“In the present case the slier force of the wounds on the deceased are indicative of malice aforethought Phyllis had a cut in the head region, which extended to the skull bones, and exposed the brains. In addition she suffered a deep cut on the right hand, with a fracture of the right hand. She also had cuts on her legs and suffered burns.....

Surely in inflicting these wounds on the deceased the appellant intended to cause the fatal harm.”

Further in the case of *Petero Sentali S/O Lemandwa v Republic [1953] 2W EACA 230, Republic v Chebeagon Arap Cherono & Another [1933] 15 KLR*.

The principle in this case is that malice aforethought can be inferred where the prosecution establishes that death was caused by unlawful act or omission by the offender in furtherance of an intention to commit any felony.

In *Njoroge v Republic [1983] KLR 197* the circumstances here were that the appellants alleged that only intended to rob the deceased with no intention to kill him. However in the process of committing the acts of the robbery the deceased was killed. Each of the appellants was convicted of murder. The court in upholding the conviction observed that the killing was carried out in furtherance of a common purpose of all of them to commit a robbery. They were therefore guilty of murder, whether they aided or abetted. See also *William Musoya J Criminal Law 2016 reprint by Law Africa at pg 321*.

It is clear from the above principles that where an accused person knows that there is a serious risk that death or grievous harm will accrue from his acts of omission or commission and without lawful excuse

goes ahead and executes his plan and as a result death occurs in my considered view malice aforethought will be inferred and applied appropriately. In my view when dealing with this concept of intention an accused person should be taken to act with knowledge in respect of his acts in a given set of circumstances unless it can be shown there existed self defence, provocation, intoxication or even insanity or any other factors to show he acted on diminished responsibility.

When considering the prosecution case there is circumstantial evidence that the deceased was raped and brutally strangled with an intention to unlawfully cause her death. The postmortem report by PW3 reveals broken neck, sexual assault, haematoma to the head, base of skull fracture, fracture of the spinal column at C4 and C5. According to PW2 and PW5 when they went to sleep in the night the deceased had not suffered any bodily harm. In the testimony of PW2 and PW5 there was a big struggle between them and the 1st accused in lighting and putting off the source of light. PW2 and PW5 confirmed that they wanted lights on but the 1st accused continued to resist and extinguishing the light until the use of the last match stick. There was no life in the body of the deceased when PW2 and PW5 woke up. This was immediately confirmed by PW1, PW4, PW5, PW7, PW10, PW12 and PW13 who later visited the murder scene. All these injuries multiple maim to the deceased accompanied with sexual assault to me is clear manifestation of malice aforethought. If one breaks the neck, base of the skull, the spinal cord and moves to commit the felony of rape will there be room to think that there was no malice in the part of the perpetrator? The perpetrators never took action or measure to mitigate the harm inflicted upon the deceased. By the deceased being subjected to such severe injuries and only left lifeless and motionless is a clear element to establish malice aforethought beyond reasonable doubt.

The circumstantial evidence in support of the charge against the accused persons introduced two doctrines applicable in this case. The first doctrine is one of aiding and abetting. This is provided for under section 20 of the Penal Code:

“(1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence and may be charged with actually committing it, that is to say:

- a. Every person who actually does the act or makes the omission which constitutes the offence.**
- b. Every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence.**
- c. Every person who aids or abets another person in committing the offence.**
- d. Any person who commits or procures any other person to commit the offence, and in the last mentioned case he may be charged either with committing the offence or with consenting or procuring its commission.”**

In the present case the record shows vide testimony of PW2 that although the two accused persons found them in then in the bedroom. The second accused at one time or another could not know when he left the scene. The following morning it was only the 1st accused who conspicuously present and who kept on encouraging PW2 and PW4 that their mother, the deceased herein was in deep sleep and therefore not to worry them. This encouragement from the 1st accused kept hope alive to PW2 and PW4 that nothing seriously wrong had happened to the deceased. Despite the frantic efforts made by PW2 and PW4 to awaken the deceased none of it bore fruits to bring back to life their mother. Little did these children know that their mother, the deceased had been fatally wounded in their presence but with no clue how it was secretly done. It is for this reason PW2 and PW4 could not even account when the 2nd accused left the house leaving behind the 1st accused.

As stated by PW2 the 1st accused also disappeared quietly as she was fixing some tea in the kitchen.

There is therefore proof beyond reasonable doubt that the two accused persons orchestrated the plan to kill the deceased in a joint venture which indeed resulted in mission accomplished.

The second doctrine is that of common intention provided for under section 21 of the Penal Code which provides as follows:

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

The Court of Appeal in the case of *Karani & 3 Others v Republic [1991] KLR 622* the court held inter alia that it suffices to show that each of the participants to an offence had knowledge of probable consequences of the present or common intention with others who committed the actual act. In the classic case of *Solomon Muigai v Republic [1965] EA 363* where the East African Court of Appeal observed on the application of common intention. The evidence must show that the accused shared with the other co-accused a common intention to pursue a specific unlawful purpose which led to the commission of the offence.

In *Njoroge v Republic [1983] KLR* the Court of Appeal stated thus:

“If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder in all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavours to the effect the common object of the assembly.

Under section 10 of the Evidence Act anything said, done or written by any of the persons seemed to have a common intention in reference to their common intention is relevant evidence of such common intention.”

What the provisions of section 21 of the Penal Code and the principles in the cited authorities demonstrate is that the doctrine of common intention involves:

- i. The doctrine of vicariously liability.**
- ii. A meeting of minds of two or more people.**
- iii. A pre-meditation to design and execute a common purpose.**
- iv. That the common intention can be premeditated, arise at the spur of the moment or during the commission of the offence.**

In reliance on the above principles the Supreme Court of India in the case of *State of Haryana AIR [1994] at 461* held thus:

“It is one of the settled principles of law that the common intention must be anterior in time to the commission of the crime. It is also equally settled law that the intention of the individual has to be inferred from the overt act or conduct or from other relevant circumstances. Therefore the totality of the circumstances must be taken into consideration in order to arrive at a conclusion whether the accused had a common intention to commit the offence under which they could be convicted. The prearranged plan may develop on the spot in other words during the course of commission of the offence.”

In the instant case one of the ingredients of murder contrary to section 203 is the existence of unlawful act of omission or commission in furtherance of act to occasion death. The acts of common intention and

conduct of the accused would be the ensuring conduct hitting the deceased on the head and or neck to cause grievous harm, secondary the act of committing a felony of raping the deceased prior to causing death. Thirdly the failure by the accused to do anything within their power to counter danger and harm they had occasioned the deceased including seeking help and medical assistance for the victim.

In this case in the course of the night PW2 realizes the deceased was not responding to their calls to wake up. According to the evidence of PW2, the 1st accused persisted in assuring them of the safety of the deceased with words that she is okay but in deep sleep. The child PW2 will see the deceased was not moving but in a turn of events strangely the 1st accused was least bothered. There is evidence from PW2 that the 1st accused left the house at about 6.00 am without any reference to them. That is when they decided to inform PW1 who in turn called in other neighbours for help and assistance.

The inference I draw from the evidence is that the conduct of the accused persons was executed in a manner that they both had a common intention. From the record the two accused persons chewed miraa together before joining the deceased in the bedroom together. The impression created earlier was for the accused persons to chew miraa to notify the deceased of the time to leave so that she could lock the house. The prosecution has therefore proved a common intention under section 21 of the Penal Code against the accused persons.

4. The ingredient of identification and placing the accused persons at the scene:

The principle governing the weight to be given on identification of a single identifying witness is set out in the case **Republic v Turnbull [1976] 63 Cr. Appeal R 132** where the court observed:

“Where the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused special need for caution before convicting in reliance of correctness of the identification is necessary, the court should warn itself of the possibility that that a mistaken witness could be a convicting one and that a number of such witnesses could be mistaken. The court should further examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally, had he have any special reason for remembering the accused? How long time elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by then and his actual appearance?”

Recognition might be more reliable than identification of a stranger, but even the court should remind itself that mistakes in recognition of close relations and friends have been made sometimes. These are the principles upon which our jurisprudence on identification has been anchored in recent cases. See **Odhiambo v Republic Cr. Appeal No. 77 of 2001, Wamunga v Republic Cr. Appeal No. 20 of 1989.**

In the present case evidence on identification was based on the testimony of PW2 a daughter to the deceased. The first time PW1 discovered the accused persons was her immediate contact with PW1 who was one of the people to visit the home at a very initial stage. The witness PW2 gave evidence about the accused as familiar faces and acquaintances to their mother the deceased. PW2 confirmed to this court that on 28/9/2014 was not the first time to see the accused in their house. According to PW2 the accused visited their home from 6.00 pm where they started chewing miraa. It was further PW1 testimony that the two spent a night in their house within the same bedroom with the deceased. Although PW1 did not recall the exact time the 2nd accused left the house. She was categorical that the 1st accused left in the morning of 29/9/2014. The witness PW2 was invited by the police to participate in an identification parade conducted by PW10. In this identification parade PW2 positively identified the two accused persons. There were no discrepancies noted in the identification evidence placed before court by the prosecution.

In the circumstances and principles set out in Turnbull Case the quality of identification by PW2 was free

from error. I had the advantage of observing PW2 both during examination and cross-examination by the defence. She impressed me as a candid, intelligent and firm witness whose response to questions was straight to the point. The defence attempt to impeach he credibility remained focused as to what transpired in the night of 28-29/9/2014 when her mother passed away. The evidence of PW1 was corroborated by PW8 testimony. According to PW8 in the evening of 28/9/2014 he passed through the deceased house at about 6.00 pm and managed to see the two accused persons chewing miraa.

Considering the evidence of PW1 who knew the accused very well prior to this incident, given the fact also that the accused spent the sufficiently long hours in the house of the deceased i find no evidence of mistaken identity or error on the part of the witness. The circumstances prevailing at the time were favourable for a positive identification to take place.

I am satisfied therefore that prosecution has established evidence to link the two accused persons with the offence.

With regards to the defence and weight has been accorded to the alibi defence. The prosecution adduced evidence in rebuttal which dislodged the defence by the accused that they were not at the scene of the murder. For these reasons i am satisfied that the evidence in support of the prosecution proves the ingredients of the offence of murder beyond reasonable doubt. I find each of the accused guilty of the offence of murder contrary to section 203 as read with section 204 of the Penal Code and do convict each one of them accordingly. As regards sentence the same be determined after sentencing hearing.

Dated, delivered in open court at Kajiado on 24th day of April, 2017.

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R. NYAKUNDI

JUDGE

In the presence of:

Mr. Sekento for both accused

Mr. Akula for Director of Public Prosecutions

Accused 1 & 2

Mr. Mateli Court Assistant