



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CRIMINAL CASE NO 21 OF 2012

REPUBLIC.....RESPONDENT

VERSUS

JOHN MAKATIANI.....ACCUSED

J U D G M E N T

Introduction

1. The Accused **John Makatiani Maviara** was charged with the count of murder contrary to Section 203 as read together with Section 204 of the Penal Code the particulars of the offence being that on the 3rd day of June 2012 at Ilala village, Shidodo Sub – location, Khayega location in Kakamega East District within Western Province, he murdered KIZITO ASHIUNDU.

The Prosecution Case

2. The prosecution called six witnesses. There was no eye witness of this incident. PW1 Beatrice Sungu Andola (Beatrice) the wife to the deceased told the court that on **02.06.2012** at around 0700a.m, the deceased who is her husband left home for work at Saint Elizabeth Mukumu Mission Hospital but did not return. On **03.06.2012** while at home, she was informed by **PW4** Elizabeth Imbwika(Elizabeth) that the deceased was very sick and needed urgent medical attention. Both Beatrice and Elizabeth left for the accused home only to find the deceased already dead lying on sofa set.

3. **PW2 Dr. Dickson Mchana** the County Pathologist at Kakamega County General Hospital conducted post mortem. He told the court that the deceased body was well preserved. That there was evidence of medical intervention before death. There was blood stain on the left chest, no fracture on the skull, but there was subdural hemorrhage involving the fore chamber, bleeding on right side, on hind chamber, there was bleeding on the right side and left side. There was blood clot on the right side of neck below the skin. Dr. Mchana formed the opinion that the cause of death was bleeding into the brain resulting from a blunt force trauma following assault. In cross examination, Dr. Mchana confirmed that the deceased died on 02.06.2012 while the autopsy was conducted on 04.06.2012.

4. **No. 232325, APC Paul Kipsang** testified as PW3 and told the court that the accused was escorted to Khayega Administration Police Camp by Ernest Wichenje Alex (Ernest) **PW5** and other with members of the public on allegation that he had killed Kizito Shiundu from Mukumu area in Shidodo Sub- location. **PW3** re-arrested the accused and escorted him to Kakamega Police Station for further investigations.

5. In cross examination by learned counsel for accused, Ms. Akinyi, **PW3** confirmed that he did not visit

the scene of crime.

6. **PW4 was Elizabeth Imbwaka** the deceased's mother who told the court that on **03.06.2012** at 1130a.m while at home, she was visited by the accused who asked her if the deceased hailed from that home. Upon confirmation, the accused told her that the deceased had spent the night at his (accused's) house and that he was very sick. When Elizabeth asked the accused why he spent the night with a sick person without informing the relatives until morning, the accused was only shaking and never responded. It was at that point that Elizabeth went to Beatrice's house and asked deceased's daughter to go and inform the mother what the accused had told her. Elizabeth in company of her cousin left for the accused home but the accused disappeared on the way. Elizabeth and others found the deceased lying on sofa set cold and dead. They called the police who came and collected the deceased body and took it to Kakamega Provincial General Hospital. She did not see any injury on the deceased body. Elizabeth testified that she knew the accused because he came from Mironje clan just like her. She identified the accused in the dock.

7. On cross examination, **Elizabeth** confirmed that **Beatrice** did not know the accused as the deceased had bought land elsewhere. **She** also told the court that she did not know if the deceased took alcohol but confirmed that the deceased and the accused knew each other.

8. **PW5 Ernest Wichenje** is a driver at **Saint Elizabeth Mukumu Mission Hospital**. He told the court that on **07.06. 2012** they carried the body of the deceased from the Hospital to Mironje Shidodo sub-location for burial. On their return to the Hospital while at Mukumu Boys High School, they saw a crowd of people where there seemed to be commotion. Upon stopping the Hospital Ambulance, a person ran from the crowd and entered through the back door that was open. Immediately, those who had alighted from the Ambulance boarded and they took off. **PW5 (Ernest)** mentioned that he was in company of Fred Shitambasi, Michael Lwapala Nateminya **PW6**, and another person whose name he could not remember. **Ernest** drove to Khayega Administration Police Camp where he handed the person who had boarded the vehicle from the crowd to the police. **He** thought that the person they had rescued was being lynched. Upon cross examination, **Ernest testified** that he knew the accused as a boda boda rider at Khayega though he had never had an opportunity to talk to him.

9. **PW6 Michael Lwapala Nateminya (Michael)** told the court that he is in charge of cleanliness at Mukumu Hospital and was informed by a friend that his colleague the deceased had died. He went to the Hospital and saw the body. He was also informed that the body was found in the house of John Makatiani lying on sofa set. Michael could not tell if the deceased's body had injuries as he did not observe the body closely. He also told the court the deceased worked in the kitchen as a cook. Michael reiterated what Ernest had said that they had rescued the accused from a mob and taken him to Khayega Administration police camp. He also identified the accused in the dock.

10. On cross examination, **Michael** told the court that he was informed by a fellow worker of the death of the deceased and that the body was taken to the mortuary by the police. He also confirmed that they rescued the accused after dropping the deceased body home for funeral. He said that he entered the accused house and found the deceased lying on a sofa set dead.

Case to answer

11. A ruling was entered by this Honorable court on **26.06.2017** where upon considering the evidence tendered by the prosecution, The court was satisfied that the prosecution had demonstrated that the evidence on record was such that if the court properly directs its mind to the same, it could convict the accused person if no explanation is forthcoming from the accused person. Guided by the principles set out in case of **Bhatt Vs Rex [1957] EA 332**, the court proceeded and put the accused on his defence in answer to the murder of **Kizito Shiundu**.

The Defence Case

12. The accused was put on his defense in compliance with **Section 306** of the Criminal Procedure Code.

He opted to give sworn evidence. He testified as **Accused** telling the court that he was a watchman within Kakamega County at an Indian shop. He denied committing the offence and stated that on 02.06.2012 he left his 4 children at home by the names; Linet Musavi, Bonface Atupa, Silas Ang'alo and Mary Athenga. He reported for duty and worked the whole night. In the morning he arrived at home at 0800am when the children told him that "**Jomba amekuja**" meaning our uncle has come on entering the house and found the deceased lying on the sofa set. He tried to call him but he did not respond. He tried to contact his brother by the name Capitus Mukabwa to find out how the deceased had entered his house but the brother had no knowledge. He decided to inform the deceased's family who lived about one kilometer away. On arrival, Elizabeth and the deceased's two and told them how he had found the deceased in his house lying on the sofa set in need of urgent medical attention. While they headed to his home, he went to the village elder but he only found his wife and explained what had transpired.

13. The accused explained that upon returning home, he found that the deceased had been taken away.

14. On being examined by the court, he denied having murdered the deceased on **03.06. 2012**. He informed the court that it was not true that **Ernest** rescued him from mob justice. He also denied that he was arrested by the police. He stated he only used **Ernest's** vehicle to Khayega Administration Police Camp where he reported the incident. He was received by **APC Kipsang** who locked him in without booking him in the OB. While commenting on the **Dr. Mchana's** evidence, the accused stated that he did not know how the deceased was injured on the head.

15. On cross- examination by Mr. Ngetich, learned Prosecution counsel, the accused person said that on **03.06.2012**, he got home from work in the morning. He did not however have any document to show that he was a watchman at an Indian shop. He stated that he was the only night watchman. He informed the court that he had left much earlier before the employer came to the premises. **Accused** said that Linet was 16years old in 2012, Boniface was 12 years in standard three born on **01.08.1998**, Silas was born on 1996 and Mary was born in 2000 therefore about 11years. He said that his daughter Linet had informed him that the deceased had come in their home the previous day when it was raining and that it was not normal for the deceased to come to his home in that manner. He also informed the court that his wife died in 2011. He said he first called his brother and then went to the deceased home to report. The accused denied the allegation that he had escaped but rather went to the village elder about a half a kilometer away to make a report. He did not find the village elder but the village elder's wife. The accused told the court he met Ernest on the road when he was heading to the police to tell them how he had found the deceased lying in his house and that the deceased had died. He said he knew the deceased who was his friend and clan member. He told the court that his children did not tell him of any other person who had accompanied the deceased to his house. He also said that Linet was now 21years of age and she had completed school. He told the court that he had an advocate but he has never asked her to call witnesses. He told the court he had heard all witnesses testify but he had no question save to Ernest Winjeche who gave him a lift. He confirmed to have known Ernest for a long time before the incident and there was no grudge with him. He informed the court he neither fought with the deceased nor murdered him.

16. On re-examination by MS. Akinyi, learned defense counsel, the accused person said that he arrived at home at 0800a.m on **03.06. 2012** only to find the deceased lying on the sofa set where he called him. He said the deceased was his brother-in-law, that he was surprised when he found him lying in his house hence he was prompted to call his people. He finally told the court that he did so out of good faith.

17. After the close of defense case, the defense counsel made written submissions dated 18.15.2017 in summary, defence counsel submitted that the prosecution had not placed any evidence before court to link the accused with the death of the deceased. Counsel also submitted that in the absence of evidence from an eye witness, the prosecution's case remained too feeble to warrant a finding of guilt against the accused. It was counsel's further submission that the accused defence of alibi was sufficient to exonerate him from the allegations, and that the burden of proof in this case, as it is the case in all Criminal Cases, is on the prosecution and not on the accused person.

18. Further Counsel submitted that the circumstantial evidence sought to be relied upon by the prosecution cannot hold and that the accused person ought to be given the benefit of the doubt and

acquitted of the charge of murder.

19. The defense also relied on the case of **Abanga alias Onyango versus Republic CR A NO, 32 OF 1990(UR)** where the learned Judge of the court of Appeal stated the principles which should be applied in order to test circumstantial evidence:

- i. The circumstances from which an inference or guilt is sought to be drawn, must be cogently and firmly established.
- ii. Those circumstances should be a definite tendency unerringly pointing towards guilt of the deceased.
- 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 no one else.

20. Defense counsel submitted that the deceased lay on a sofa set in the house of the accused. The first thing the accused did was to report the matter to Beatrice and Elizabeth. Inference of guilt cannot be made here. Further that on his way to report the matter, he met Ernest who escorted him to the police station where the accused reported the matter. That such conduct does not show any proof of guilt.

1) In his defense, the accused raises a defense of alibi. In **Uganda versus Sebyala and others(1969) EA 204** the learned Judge quoted a statement by his lordship the chief Justice of Tanzania in criminal Appeal no. 12D68 of 1969 where his Lordship observed ;

“The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution’s case is thin an alibi which is not partially strong may very well raise doubt. In that regard, there is doubt created by the alibi raised by the accused.”

21. In concluding the submission, counsel for the accused further submitted that, the credibility of the prosecution case was at stake because there was no eye witness and no evidence was given to show that the deceased had struggled with somebody. In brief counsel submitted that there was no evidence to implicate the accused in the murder and consequently prayed that the accused be acquitted of the same.

22. Other authorities cited by the defence were:-

(a) **Solomon Kiri Mirukana Vrs Republic- Criminal Appeal No. 46 Of 2011**

(b) **Republic Vrs Josephat Kipruto Bett- Criminal Case No. 42 Of 2011**

23. Mr. Jamsumba learned Prosecution Counsel submitted that they relied on the evidence on record and urged the court to find the accused person guilty as charged.

Determination of the Case.

24. The issues for determination are:-

- i. If the charge of murder facing the accused person has been proved beyond reasonable doubt;
- ii. If not, is the evidence on record sufficient to convict the accused person on a lesser charge of manslaughter?
- iii. Is there sufficient circumstantial evidence upon which this court can base a conviction?

25. It is trite that for a charge of murder to hold, the prosecution has to prove that there was malice

aforethought as defined under **section 206** of the Penal Code which provides that-

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—

(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 the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) An intent to commit a felony;

(d) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.” The prosecution must also prove the death and cause of the deceased’s death.

26. The evidence in the instant case is circumstantial in nature. There was no single eye witness. Beatrice said that the deceased had left home for work on 02.06.2012 never to return. The deceased according to Accused, was found lying on a sofa set. PW2 DR. Dickson Mchana told the court that there were signs of medical intervention before the death of the deceased. He also told the court in cross examination that “it appears that the deceased was involved in a struggle and was defending himself when he sustained defence injuries.” be that as it may, I find that the state did not prove malice aforethought under Section 206 **(a)** and **(b)** of the Penal Code beyond reasonable doubt.

27. In the case of **Mwangi & Another vs. Republic (2004) 2 KLR32** the court of Appeal held the following on circumstantial evidence:-

“In a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge.”

28. Still on circumstantial evidence, in the case of **Sawe vs. Republic (2003) KLR 364**, the Court of Appeal held *inter alia*-

1) In order to justify on circumstantial evidence, the inference of guilt, the exculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilty,

2) Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of the circumstances relied on;

3) The burden of proving acts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.”

29. Looking at the circumstances surrounding the deceased’s death, I am convinced by the evidence adduced by the prosecution that the deceased spent the night in the accused person’s house on 02.06.2012. Although the accused does not have to prove his innocence, I find his evidence in chief and his evidence in cross examination contradictory. In one breath he told the court that he only left his working place after his employer arrived, in the next he said that he was the only one on duty. After having left earlier, he told this court that the employer reported at the premises at 0600a.m. The accused reported the matter to the family at around 1130a.m and he was shaking and not talking freely when he

was in Elizabeth's house. I find it questionable when the accused informed Elizabeth that the deceased needed urgent medical attention, when in fact the deceased was already dead.

30. I have carefully considered the written submissions of the accused in his defense. He puts forward an alibi and said he never was in his house when the deceased came and that he was working as a night watchman at an Indian shop in Kakamega. From the record, I find that the alibi defence has been fully misplaced by the evidence adduced by the prosecution. Although the accused is under no duty to adduce any evidence in his defence, he has a duty to give reliable, satisfactory and coherent evidence. The testimony given by the accused seems to suggest that the accused is not to be trusted with his words. I therefore reject his alibi defence.

31. A close examination of the post mortem report produced by Dr. Mchana as exhibit 1 reveals that the pathologist formed the opinion that the cause of death was bleeding into the brain resulting from a blunt force trauma following assault. On cross-examination, the Doctor was of the opinion that it appeared the deceased was involved in a struggle and was defending himself when he sustained the injury. He told the court that such injuries lead to coma and eventual death.

32. This court notes that what the Doctor said on cross examination on the deceased's cause of death was relevant all through the examination and consistent. The accused claimed that he called the deceased but was not responding, the deceased was in a coma. There was no immediate medical treatment to the deceased. The accused was the only adult person in the house as his wife had died some time back in the year 2011. Having found that the accused's defence of alibi cannot stand in the face of the prosecution evidence, I am satisfied that the accused was in the house with the deceased when the deceased sustained the injuries he died from.

33. It is my findings that the chain of circumstantial evidence in this case is so closely intertwined that it leaves no weak link in the chain. The only hypothesis that can be drawn is that of guilt on the part of the accused person. He is the only person who had the opportunity to commit the offense as he was with the deceased in his house. The deceased was found dead in the morning.

34. I have weighed the accused person's defense against PW 1 to 5's evidence and I am satisfied that the prosecution has proved a case of manslaughter against the accused person beyond reasonable doubt. I therefore substitute the charge of murder with one of manslaughter contrary to section 202 as read with 205 of the Penal Code. It has not been proved that the accused person had malice aforethought. I therefore find the accused person herein guilty of the lesser charge of manslaughter contrary to section 202 as read with 205 of the Penal Code. I convict him accordingly.

It is so ordered

Judgment delivered, dated and signed at Kakamega in open court on this 19th day of September 2017

RUTH N. SITATI

JUDGE

In the presence of:-

.....**Mr. Juma (present)**.....**for the accused.**

.....**Mr. Ondieki holding brief for Miss Akinyi (present)**.....**for State**

.....**Polycap Mukabwa**.....**Court Assistant.**