



REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL CASE NO. 1 OF 2014
REPUBLIC.....PROSECUTOR
VERSUS
PETER MUTINDA MUTISOACCUSED

JUDGMENT

Peter Mutinda Mutiso the Accused person herein, was charged with the offence of murder contrary to section 203 as read together with section 204 of the Penal Code. The particulars of the charge as stated in the information from the Director of Public Prosecution dated 6th January 2013 are that the accused Person murdered Kyalo Mutiso (herein referred to as the Deceased), on 20th December 2013 at Twamavindi Village, Liani Sub location, Kivaa Location in Masinga District within Machakos County. The accused pleaded not guilty to the offence on 15th January 2014.

The trial commenced before Mutende J. who heard eight prosecution witnesses. I took over conduct of the trial after complying with the provisions of Section 200 of the Criminal Procedure Code, after the learned judge was transferred. I proceeded to hear the ninth and last prosecution witness. The Accused Person was found to have a case to answer in a ruling delivered by this court on 24th May 2016 and put on his defence.

I have read the original record of the trial as well as the typed proceedings of the same and submissions that are on record. The learned counsel for the Accused Persons, B J.N. Kimeu & Company Advocates, filed final written submissions dated 19th July 2017, while Ms. Rita Rono the learned Prosecution Counsel filed her final submissions dated 18th August 2017.

In my consideration and analysis of the evidence and submissions made, I am guided by the definition of the offence of murder in section 203 of the Penal Code which provides as follows:

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

Therefore in order to establish and to secure a conviction for the offence of murder, the prosecution must prove beyond reasonable doubt the following ingredients;

- a. Evidence of the fact and cause of death of the deceased.
- b. Evidence that the deceased met his death as the result of an unlawful act or omission on the part of the accused.
- c. Evidence that the said unlawful act or omission was committed with malice aforethought.

In order to establish malice aforethought, section 206 of the Penal Code provides that there should be evidence of:

- i. Intention to cause death of or grievous harm to any person whether that person is the one who actually died or not.
- ii. 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.
- iii. Intent to commit a felony.
- iv. 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

On the Fact and Cause of Death:

On 20th December 2012, the Deceased woke up James Musyoki Mutinda (PW1) and Buru Muasya (PW2), who testified that he wanted them to go to the river to assist him loading sand into a lorry. While at the river the three heard people screaming towards their direction, and the Deceased went to check on who was screaming. PW2 were then told by people who came to the river that the Deceased had been shot with an arrow. PW1 left and went home, while PW2 went to inform the Deceased's relatives and returned to the scene and started looking for the Deceased with the Police.

PW2 testified that they found the Deceased lying next to a pool of blood with an arrow which had blood besides him, and that he had been shot with an arrow. Further, that when they called out to him he was able to talk. The police officers then sent for his relatives who carried the Deceased, and sought the assistance of Nyamai Mutiso (PW3) to take him to hospital.

PW3 on his part testified that he received a call from his nephew informing him that the Deceased had been shot by an arrow, he therefore went to find out and he found the Deceased with the Police. The Deceased was sitting down and he had been shot with an arrow on his right chest near the shoulder. The Police had an arrow in their possession which they gave to PW3 and requested him to take the Deceased to the Hospital.

PW3 testified that they first took the Deceased to Matuu Police Station where the Deceased reported the incident, and the arrow was handed to the police, before taking the Deceased to Mercy Private Hospital and Kilimambogo hospitals which could not treat him. They were advised to take the Deceased to St Mulumba Hospital where he was admitted and pronounced dead on the same day. PW3 testified that they then took the body to Matuu Police Station to report the death and took the body to Matuu Mortuary. PW3 also testified that he identified the body of the Deceased to the doctor who performed the post-mortem.

Dr. Simon Kioko Muli (PW7) a retired doctor based at Matuu Town, testified that on 26th December, 2013 he carried out a post mortem examination on the body of the deceased after it had been identified by Kitela Kimangi and Nyamae Mutiso in the presence of Cpl. David Sang. PW7 testified that the body had a penetrating wound on the right side of the chest, there was right chest haemothorax and that the left lung had collapsed. He produced the post mortem report as Exhibit 2, which identified the cause of death as cardiopulmonary arrest and pulmonary collapse due to penetrating chest injuries inflicted by a sharp object.

The fact and cause of death of the Deceased was thus proved by the Prosecution.

On the Unlawful Acts or Omissions on the part of the Accused Person:

None of the prosecution witness testified that they saw the Accused shoot the Deceased with an arrow. Several witnesses testified that they got information that it was the Accused who shot the Deceased. PW1

testified that he was told by one Wambua Kaloki that the driver of the lorry being loaded with stand should leave the scene, or he would be shot the way the Deceased had been shot by Peter Mutinda Mutiso with an arrow. The said Wambua Kaloki was called as a Defence witness and denied that the Accused Person was armed with an arrow at the scene.

Dickson Muasya Wambua (PW8) on his part testified that on 20th December 2013 he heard noises emanating from the side of Eueme and when he went to find out what was happening, he saw the Accused Person standing by the river Eueme and he was carrying a bow and arrow. Further, that he heard the Accused Person say that he was waiting for another person to strike him as he had done with the deceased. PW8 also testified that he saw the Deceased at the scene and the Deceased was standing and had no injuries, and was telling the people to leave so that they could carry sand. PW8 stated that he later heard the Deceased had died, and on cross examination and re-examination confirmed that when he left the scene the Deceased did not have any injuries.

The main evidence that linked the Accused person to the death of the Deceased were statements that the Deceased made to various witnesses after he was found with the arrow wound, and before he died. PW3 in this respect testified that after they found the deceased, he heard the Deceased state that that Peter Mutiso had shot him with an arrow.

Jackson Makau Makuti (PW4) the Assistant Chief of Iiyani sub-location testified that on 20th December, 2013 at 9:00am he heard noises from people towards the direction of the river, and when he went to find out he was told that the Deceased had been shot by an arrow. PW4 together with Corporal Muriithi and Police Constable Ndanga decided to investigate the matter, and they followed a blood trail and they found the deceased lying unconscious at the boundary of one Mamunye Mutiso and one Nzali. They carried the Deceased to the roadside where he regained consciousness, and told them that his uncle Nyamae Mutiso is the one who had shot him with an arrow. PW4 testified that he knew the Accused Person as Nyamae Mutiso.

The evidence of PW4 was corroborated by that of Corporal Augustus Mureithi (PW9) who testified that on 20th December 2013 he was at Iiani Administration Police camp in Masinga sub-county when he got a telephone call that there was trouble at Iuma stream at Twamavindu. He went to the place and found PW4 addressing members of the public, and after the meeting they were told that someone had been shot by an arrow.

Together with PW4 and other elders, PW9 followed a blood trail on leaves upto the place where they found the Deceased in a thicket sleeping, and he had been shot on his left chest with an arrow and was bleeding. They woke him up and asked what was wrong, and he said he had been shot with an arrow by his uncle called Mutinda, and he gave them an arrow which was next to them. They carried the Deceased to the main road and called the Deceased's relatives. PW9 testified that he gave PW3 the arrow to take to the hospital in case it had poison.

PW9 then went to the home of the person who had been mentioned by the Deceased, but did not find him, and were told that the person had been seen at Iiani market. He then went to the market with PW4 where they found and arrested the Accused Person, and took him to the Administration Police Camp.

PC Richard Odera (PW5) was attached at Matuu Police Station on 20th December 2012, when the Deceased and Nyamae Mutiso came there at 12.30pm, and the Deceased indicated he wanted to make a statement that he had been assaulted by one Peter Mutinda who had shot him with an arrow. PW5 then booked the report in the occurrence book. He also testified that the Deceased came with the arrow. Further, that at 6.00 pm, Nyamae Mutiso came to the Police Station and reported that the Deceased had died, and PW5 gave them a note to take the body to the mortuary, and retained the arrow which he gave to the crime office.

Corporal David Sang (PW6) testified that on 20th December 2013 he was in charge of Kariburo Police Post, and that he received a telephone call from the Officer Commanding Masinga Police Division that

Administration Police from Iiani Administration Police camp had arrested the Accused on allegations that he had shot the Deceased that morning. Further, that he went and collected the Accused person and took him to Matuu Police station where he was placed in the cells and later taken to Court on 23rd December 2013.

PW6 also testified that he was the investigating officer of the case and he went to the scene where the deceased had been found shot, and accompanied relatives of the Deceased to identify the body of the Deceased during the post-mortem. Further, that PW5 handed to him the arrow which had been used, which he produced in Court as an exhibit.

The Accused Person gave sworn testimony in Court as DW1, and called an additional witness, Joseph Wambua Kaloki as DW2. The Accused Person denied having seen the deceased on the day in question, and that he was at his shamba when he heard screams from the stream and went to find out what the matter was. He also denied having inflicted any injury on the Deceased. He said he was not arrested at the scene on that day, but he was arrested at the market. He stated that the Deceased was his uncle and he had no grudge against him and therefore had no reason to shoot him.

DW2 testified that he did not see the Deceased at the scene on that day, but he saw the Accused person go to the river after hearing screams, and he also saw him leave. He did not see anyone injured or lying down.

The Accused Person's counsel in his submissions argued that the Prosecution's case is premised on hearsay, since no evidence was adduced to link the Accused Person to the death of the Deceased. , and no nexus was created between the arrow recovered from the Deceased and the Accused person. Further, that the statement by the Deceased that he was shot by the Accused Person was a dying declaration and was not sufficient enough to find the Accused Person guilty as no other evidence was adduced to link the the Accused Person to the offence. Therefore, that it would be unsafe to convict the Accused Person on the same. Reliance was placed on the decision in Sospeter Mayenga Ameyia vs Republic, (2010) e KLR where a similar finding was made.

The Accused Person's counsel further submitted that in the absence of eye witnesses, no circumstantial evidence was adduced by the Prosecution and that its case is based solely on hearsay and suspicion and must fail. Reliance was also placed on the Court of Appeal decisions in David Ngugi Gichuru vs Republic, (2011) e KLR, and Nelson Julius Karanja Irungu vs Republic (2010) e KLR on the need for corroboration of a dying declaration.

The Prosecution in their submissions relied on the case of Republic vs Nkuru Gwatia Rukaria (2014) e KLR for the position that the Accused Person was armed with a bow and arrows before he went to where the Deceased was harvesting land, and the Deceased made a dying declaration that it was the Accused Person who shot him with an arrow, who was therefore clearly pointed out as the person responsible for the Deceased's death.

Section 33(a) of the Evidence Act provides for the admissibility of a statement made by a deceased person as his or her dying declaration as follows:-

“33.Statements, written or oral, of admissible facts made by a person who is dead,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;.....”

In the present case, the words uttered by the deceased and heard by the witnesses were as to the person

who shot him with an arrow, and were uttered at the point of death since the deceased died on the same day from the said injuries. They are therefore admissible under section 33(a) of the Evidence Act.

In addition, the principles of law on reliance on a dying declaration to support a conviction were stated by the Court of Appeal in the case of **Choge vs Republic 1985 KLR 1** as follows:

“The general rule 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 consideration to tell the truth. 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.”

The Deceased knew his attacker and identified him by name to several witnesses and stated that the person was his uncle. This relationship of the Deceased being his nephew was admitted by the Accused Person. In addition, the incident happened during daytime. I however note that the testimony by PW3, PW4, PW5 and PW9 was inconsistent as to the statement made by the Deceased on the person who shot him with an arrow. While PW3 stated that the Deceased told him it was Peter Mutiso, PW5 indicated he said it was Peter Mutinda, and PW9 indicated that the Deceased stated that it was Mutinda. PW4 on the other hand stated that the Deceased stated that the person who shot him was a Nyamae Mutiso, a name shared by PW3.

Lastly, the only corroboration of the dying declaration was from PW8, who placed the Accused Person at the scene which was at the river, armed with a bow and arrows. However, the same witness also placed the Deceased person at the scene at the same time, alive and well with no injuries. Likewise, the other prosecution witnesses who were at the scene did not see the Accused Person with a bow and arrows.

I also note that the Accused Person in his defence did admit going to the river, as did DW2 who testified that he saw the Accused Person go the river but did not see him with any bow and arrow. Having evaluated the evidence, I find that there was insufficient corroboration of the dying declaration by the Deceased to support a conviction.

On malice aforethought:

Finally the prosecution established in the evidence by PW1, PW2, PW4 and PW8 that there was general hostility by the community towards the Deceased, as a result of his actions of harvesting and loading sand from the river. None of the witnesses also testified as to any disagreements between the Accused Person and Deceased. In addition, DW2 stated that the land belonging to the Accused Person’s and Deceased’s family was the one that had sand, and neighbours were opposed to those harvesting sand from the land. Therefore, there were many people who had a motive to harm the Deceased.

Consequently, I do find that that the prosecution has not established its case against the Accused Person beyond any reasonable doubt. I accordingly find the Accused Person not guilty of the offence of murder and acquit him. The Accused Persons shall forthwith be released from prison custody unless otherwise lawfully held.

Orders accordingly.

DATED AND SIGNED AT MACHAKOS THIS 16TH DAY OF OCTOBER 2017.

P. NYAMWEYA

JUDGE