



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

CRIMINAL CASE NO. 37 OF 2014.

REPUBLICPROSECUTOR

VERSUS

ANTHONY KHANYAHA SITUETI ACCUSED

J U D G M E N T

Introduction

1. Anthony Khanyaha Situeti is accused of murder contrary to section 203 as read with section 204 of the Penal code. The particulars of the offence are that on the 6th day of July, 2014 at Bulukhombe village Mahanga sub-location, Sharivinga location in Hamisi Sub County within Vihiga County he murdered THOMAS SALALA SITUETI.

2. The accused denied the charge and the matter proceeded for hearing.

The Prosecution Case

3. The prosecution called five (5) witnesses. It is important to note that the incident herein happened within the home and involved members of one family.

4. PW1 Joseph Sabara Sakayo (Joseph) an uncle to the accused and the brother to the deceased testified that on the 6th July, 2014 at about 8.30 p.m. he was woken up by some noise from the deceased house. He got up and went to the deceased's house which is 20 meters away. He saw the accused beating his father with a spade which broke in the process. He pleaded with the accused to stop beating his father but the accused threatened him with dire consequences if he continued pestering him.

5. Joseph left the accused alone and went to the village elder Loys Mmbone Luyeku, PW2 (loys) and reported to her the incident. The village elder noted that it was late and promised to see what to do the next day. Joseph went back home but did not sleep in his house for fear of being attacked by the accused. He went back to the village elder the next morning and she promised to visit the scene. The accused also went and reported to the village elder that his father had died. He also told Joseph that his father had died. When Joseph went to accused home where he confirmed the father had died. The chief and police were called to the scene and collected the body. The accused was also arrested on the same day.

6. It came out during cross examination of Joseph that both the accused and the deceased were drunk on that 6th July, 2014 and that there was some disagreement over gold deposits on their farm.

7. Loys, the village elder from Makuti sub location testified that on 6th July, 2014 Joseph went to report to her that accused was quarrelling with his father. She promised to attend to the matter the next day. The next day in the morning Joseph again went to her house carrying a broken piece of wood and informed her that it was that piece of wood that accused had used to beat his father.

8. Before she went to the scene the accused arrived at her home and reported to her that his father was dead. She went with the accused to their house and confirmed that accused's father had died. She saw the body lying on the bed with injuries. She then contacted the area assistant chief who went to the scene with some other men.

9. PW3 Seth Nandwa Jiveti (Seth) the Assistant chief of Makuti sub location testified that on the 7th July, 2014 he received a call from Loys informing him of the murder. He went to the scene immediately and confirmed that indeed the deceased had died. He saw injuries on the deceased's body and on enquiry he was told that the deceased had quarreled with the accused and that the accused had killed him. He arrested the accused and took him to the police station.

10. PW4 DR. DAVID AKALICHE ADORI produced the post mortem report which had been prepared by Dr. Emurundi who had since been transferred to another facility. He gave the finding as per the post mortem report. Externally the body had multiple bruises over the left orbital region left costal and left hip region. There was a deep cut wound on the cranial aspect. Internally there was fibrosis in the respiratory system with fractures of the left 3rd-7th ribs. There was also a fracture of the neck. The doctor formed the opinion that the cause of death was cardiopulmonary arrest due to massive haemorrhage. The post mortem report was signed by Dr. Emurundi and duly stamped with the hospital stamp. The post mortem report was produced and marked as PExhibit 3.

11. PW5 was NO. 71799 CPL. GILBERT EKIRAPA attached to Cheptul Police Base which is under Serem Police Station. He investigated the case herein. He testified that on the 7th July, 2014 Joseph, Seth and Loys reported to the police that they had arrested the accused. Joseph explained to him what had happened the previous night and how the accused had quarreled with his father (now deceased). PW5 duly informed the OCS of Serem Police Station and they went together to the scene in the company of the reportees. They saw the deceased's body in the house. During interrogation, the accused told them of a quarrel he had picked with his father over some gold deposits. The accused told him that he became angry and took a spade and hit his father with it until the handle broke. He produced the broken handle as "PEX. 1" and the spade "PEX. 2". They took the deceased's body to Vihiga hospital for post mortem which was done on 9th July, 2014. The suspect was mentally examined and was found fit for trial and subsequently charged. During his investigations the Investigating Officer established that the suspect and deceased shared a house but occupied different rooms. The prosecution closed its case.

Defence Case

12. At the close of the prosecution case, the accused was placed on his defence. He gave a sworn statement but did not call any witness. In his defence the accused told the court that he and the deceased were living peacefully though his father used to take busaa and changaa and would at times be quarrelsome and even fight with neighbours.

13. On 6th July, 2014 he came home at about 8 p.m and found his father quarrelling. The deceased was armed with a spade. His father was already drunk. He testified that his father told him to leave his house and threw the spade at him. The spade injured him on his head. As he was defending himself he threw the spade back at his father and it hit him on the right hand and his father fell down on his back. He claimed to have called Joseph who took the deceased to the house. When he checked on his father in the morning, he found he had died.

15. He then ran and informed Joseph that his father had died. Together they went and informed the village elder. He denied murdering the father and maintained that the father died because of his drunkenness. The defence closed its case and filed written submissions.

Analysis and Determination

15. It is now the duty of this court after hearing the prosecution witnesses and defence and after going through the submissions to analyse the evidence and make a finding on whether the prosecution has proved its case to the required standard.

16. Murder is defined by section 203 of the penal code Cap 63 Laws of Kenya as follows:-

“203 Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.” It is therefore required of the prosecution to prove the following three crucial ingredients in order to establish the charge of murder:-

- a) Proof of the fact as well as the cause of the death of the deceased persons;
- b) Proof that the death of the deceased resulted from an unlawful act or omission on the part of the accused person;
- c) Proof that such unlawful act or omission was committed with malice aforethought.

17. With regard to the first ingredient, there is little controversy that the deceased died. Joseph as well as the accused agree that in the morning of the 7th July, 2014 they found the lifeless body of the deceased on the bed. This was confirmed by Loys, Seth and PW5 who saw the body lying on the bed lifeless. The cause of death was clearly stated by Dr. Adon who took the court through the post mortem report that was prepared by his colleague Dr. Emurundi. In the said report the doctor opined the cause of death was cardiopulmonary arrest due to massive haemorrhage.

18. The second issue for determination is whether the deceased death was as a result of the accused unlawful act or omission. From the evidence the accused lived together with the deceased in the same house though they occupied separate rooms. They were neighbours with Joseph and that is why Joseph was able to hear the accused arguing with his father when he told him “Utaniona”. Joseph went to the deceased house where he saw the accused hitting the deceased with a spade until it broke. When he could not perused the accused to stop assaulting the deceased, Joseph reported to the village elder that the accused was beating his father. Since he had been threatened by the accused Joseph was scared to go back to his house and spent the night in the nearby bushes. The next morning he again went to Loys’ home to report that the deceased had died. He carried with him the handle of the spade which he handed over to Loys. It was at Loy’s house that the accused ran to report that his father was dead. If it were not for the commotion at the deceased’s home, Joseph would not have witnessed the quarrel between the deceased and the accused.

19. Loys testified that Joseph was accompanied by two persons when he went to see her. The two were not. However, called as witnesses. But as I have stated hereinabove Joseph saw the accused beating the deceased with a spade and the broken spade was produced in two pieces: the handle and the spade itself broken. It means therefore that the force that was used by the accused was excessive and this was the force that led to the broken ribs of the deceased. There is no other explanation that can be given on how the ribs were broken. I find therefore that the prosecution proved the Second ingredient of the offence of murder, namely that the deceased died as a result of the unlawful act on the part of the accused.

20. There is no doubt in my mind that he accused was properly identified through recognition by Joseph, his uncle whose house was only 20 meters away. In the case of **Wamunga – Vs – Republic [1989] KLR 424 , the Court of Appeal citing the case of Turnbull – vs – R[1976] 3 ALL ER 576, held inter alias that**

“Recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”

21. In the instant case, Joseph knew the accused well and as such was in a position to recognize, and identify him, as he assaulted the deceased.

22. The last issue for determination is whether the prosecution has proved malice aforethought. Section 206 of the Penal Code defines malice aforethought as follows:-

“206 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 the 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 cause a felony.

(d) An intention

23. In the particular case, the accused has an altercation with his father who he (accused) said was a habitual drunkard. According to Joseph, the accused was also a habitual drunkard, and for a sometime, the two had contended over some alleged gold deposits on the deceased’s shamba. The accused had no house of his own and was living with the father and on the fateful night, the deceased wanted the accused to move out of the house. The accused must have been enraged by the deceased’s order that the (accused) move out of deceased’s house and that is when the accused according to Joseph, told the deceased, “utaniona” and started beating the deceased. When Joseph arrived at the deceased’s home, shortly after hearing some noise and the accused saying to the deceased, “Utaniona” he found the accused hitting the deceased with a spade. The beating was such that the spade broke, separately the wooden and metal parts of the spade.

24. Joseph stated that he pleaded with the accused to stop bearing the deceased, but the accused could hear none of it and instead warned Joseph that if he did not leave the accused alone, he (Joseph) would be the next victim. The accused does not deny assaulting the deceased. What he says however is that he was defending himself against the deceased who had thrown the spade at him first.

25. I have carefully considered the defence by the accused person, but I am not convinced that the deceased threw the spade at the accused. Even if I were to make such a finding, the response by the accused was brutal, and as a result of the same, the deceased suffered fatal injuries. I am aware of the fact that the only witnesses who witnessed the incident was Joseph and as a court there is need to exercise caution when basing a conviction of an accused upon such evidence. I am however satisfied that Joseph was a truthful and candid witness whose testimony has not been displaced by sworn evidence given by the accused.

26. In the premises, I am satisfied that having known of the drunken state of the deceased, the accused must have known that the beating he gave his father was likely to cause death of or grievous harm to the deceased, and I so find. In other words, the prosecution has proved that he accused committed the act of assaulting the deceased with malice aforethought. The accused’s conduct was reckless.

Conclusion

27. In light of the above, I find the accused herein ANTHONY KHANYAHA SITUETI guilty of the murder of Thomas Salala Situeti and convict accordingly under Section 322(1) of the Criminal Procedure

Code.

Orders according

Judgment delivered, dated and signed in open court at Kakamega this 13th day of October 2017

RUTH N. SITATI

JUDGE

In the presence of;-

Mr. Ngetich(present).....for State

Mr. Amasakha for M/s Rauto.....for Accused persons

Polycap.....Court Assistant