



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CRIMINAL CASE NO. 26 OF 2011
REPUBLIC.....PROSECUTOR
VERSUS
HENRY ANYANGU ANYINYA.....ACCUSED
J U D G M E N T

Introduction

1. Henry ANyinya Anyangu, the accused herein is charged with the murder of Mary Ashuma Mirikau contrary to Section 203 as read with Section 204 of the Penal Code. The particulars are that on the 17th day of March, 2011 at Elukokho Village, Ibokolo Sub-Location Marama Central Location in Butere District within Kakamega County he murdered Mary Ashiuma Mirikau. The accused pleaded not guilty to charge. The case then proceeded to full trial.

Prosecution Case

2. According to the testimonies of the 8 prosecution witnesses, the incident that led to the death of the deceased took place in her compound where she lived wither two grandsons. Fredrick Aswani and the accused in this case. At about 3.00pm on 17.03.2011, Brigit Barasa who testified as PW1 (Brigit) was in the shamba planting beans when she heard a loud voice from the family compound. She ran back into the compound and found the accused and his brother Fredrick Aswani fighting with the deceased trying to separate them. The accused then took a stone and aimed it at his brother, but instead the stone hit the deceased on the head and the deceased immediately fell down. Brigit called neighbours for help from neighbours, among them Lorna Ombyo who came and poured water on the deceased before the deceased was taken to Butere District Hospital.

3. Fredrick Anyangu who was PW6(Fredrick) testified that on the material day, the accused came home and picked up a quarrel with his on allegations that he (Fredrick) had eft his cow to wander into the accused's portion of land. When Fredrick denied the allegations. The accused went into the house and came out with a jembe (hoe), and dared Fredrick to a fight. In the meantime, Eunice Auma Okwako (Eunice) who testified as PW7 and was in the compound washing utensils sensed danger coming. She screamed for help. Her screams attracted Jacob Musebe Mirikau who was PW4 (Jacob). Jacob intervened by disarming the accused. The deceased who was in her house then came out and on seeing what was happening, tried to separate the fighting grandchildren. In the process, the accused picked up stone and started throwing the stones at Fredrick as he also shouted that he wanted the deceased to give him his share of the land. The accused was adamant, according to Fredrick, that he would kill the deceased, if she did not show him his share of the land. In the process of throwing stones at Fredrick, one

of the stones hit the deceased on the head and she fell down unconscious.

4. According to Jacob, when the accused realized that the deceased had fallen down and was unconscious after being hit on the head with a stone, the accused ran away to the police station and came back with two police officers who arrested both accused and his brother Fredrick. The deceased succumbed to the injuries while undergoing treatment at Butere District Hospital on the same day.

5. An autopsy was done on the body of the deceased by Dr. Anangwe on 20.4.2011 although it was PW5 Dr. Juma Sebastian Hayombe who produced the post mortem report on behalf of Dr. Anangwe. He testified that he had known Dr. Anangwe for ten (10) years and was conversant with his hand writing and signature. The production of the post mortem report was not objected to by the defence.

6. Dr. Juma testified that the body was one day post death and the head had an old healing wound estimated to be 3 – 4 weeks old. There was a wound on the right side of the head measuring 5-6 cm long and in it was oozing puss which had spread on the head.

7. Internally the head had a depressed fracture from a hitting on the head. The doctor concluded that the cause of death was increased intracranial pressure due to trauma to the injury on the head. The death certificate No. DA 093638 issued and signed by Dr. Anangwe and duly stamped was produced as PExhibit 1.

8. PW8, No. 82048733 CPL Jackson Njogu from Chirahia AP Camp testified that on the 17.03.2011 the accused reported to him that Fredrick had hit his grandmother with a stone and that she had fallen down. After receiving the report they rushed to the scene with the accused and another officer Cyrus Ozwara. They found family members who included Fredrick. They did not find the deceased as she had already been taken to hospital. There was blood where the deceased allegedly fell and there was a stone allegedly used to hit the deceased who was trying to separate the brothers who were fighting. During interrogation of witnesses, PW8 established that it was the accused who threw the stone at the deceased. He took the stone and arrested the accused and took him to the AP camp at about 8.30 p.m later the accused was taken away to Butere Police Station. He produced the stone which was marked as "PMFI 2".

Defence Case

9. At the close of the prosecution case the court was satisfied that a prima facie case had been established against the accused person who was put on his defence. He gave a sworn testimony but did not call any witnesses.

10. In his defence the accused testified that he was an employee of West Kenya Sugar Company Limited. He denied the charge of murder against him. He testified that on the 17.03.2011 he went to work as usual in the morning. His wife then called him informing him that his brother was quarreling with his grandmother (the deceased). This was about 8.30 am. Since the wife requested him to go home so that they could address Fredrick's complaints he asked for permission which was granted and he left. He arrived home at 12.00 at 2.50pm he heard his brother talking about his (accused's) presence at home and saying that if he did not explain the whereabouts of Kshs.1.5M given to him by the deceased, he would see. He heard the deceased asking Fredrick why he always disturbed whenever he was drunk.

11. The accused then decided to go to the grandmother's house to intervene but a struggle ensued between him and Fredrick. As they struggled his grandmother was pushed and she fell down as his brother pushed the door to the deceased's house. The deceased lost consciousness. First aid applied to her did not help her to regain consciousness. He then decided to report the incident to the AP camp. When he came back he found his brother had told neighbours that he had hit the deceased with a stone and had run away.

12. The accused also testified that he heard PW4 tell the police that the sum of kshs.1.5M given to him the deceased was the reason for the troubles between accused and deceased. They were both arrested but later his brother was released. He denied the charge.

Submissions

13. Mr. Aburili, counsel for the accused filed lengthily written submission in which he cast doubt on the credibility of the prosecution witnesses. He placed reliance on the case of **Ndungu Kimanyi – vs – Republic [1979] KLR 282** where the court held that “the witness upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straight forward person, or raise a suspicion about his trustworthiness or do (or say) something which indicates that he is a person of doubtful integrity and therefore an unreliable witness which makes it unsafe to accept his evidence.” In counsel’s view, all the witnesses who testified in court were liars and are not straightforward persons.

14. The defence also submitted that the prosecution evidence was full of contradictions and discrepancies and that such evidence should be discarded by the court. In this regard, reliance was placed on the case of **Solomon Musyoka Ngulu – vs Republic HCCRA No. 7 of 2003 [2006] eKLR**, and that in such circumstances, such evidence could not form a basis for a conviction.

15. Finally, counsel submitted that the investigation of this case against the accused left a lot to be desired, and that failure by the prosecution to call the investigating officer leaves the court in the dark as to how and when the charge sheet was prepared, thereby throwing the allegations that the accused killed the deceased in the balance. Counsel cited the case of **Wafula & 3 others Vs - Republic [1986] KLR 627** in urging the court to acquit the accused for lack of proper investigations. The prosecution relied on the evidence on record.

Analysis and Determination

16. This court having heard both the prosecution and the defence and having carefully considered the submissions by defence counsel will now proceed to a determination based on the above analysis. The task before the court is to determine whether the charge of murder has been proved to the legally accepted standard being proof beyond reasonable doubt.

17. The offence of murder is defined by Section 203 of the Penal Code as follows:-

“203 Any person who of malice forethought causes death of another person by an unlawful act or omission is guilty of murder”. This definition raises four crucial ingredients of the offence of murder all four of which the prosecution must prove beyond a reasonable doubt in order to prove the charge. The four crucial ingredients of the offence of murder case:”

(1) The fact of the death of the deceased

(2) The cause of such death

(3) Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused person and lastly

(4) Proof that the said unlawful act or omission was committed with malice aforethought.

18. On the first issue there is no controversy about the death of the deceased. All the prosecution witnesses and the accused testified that the deceased died while undergoing treatment after she collapsed and became unconscious at her home before she was taken to hospital. The incident in this case occurred during the day and everything that happened could and be was seen by the witnesses. Each and every witness gave his/her account of what he/she saw. There was no difficulty in seeing what was happening.

19. The second issue on the cause of death is also not in controversy. Dr. Juma Sebastian Hayombe who testified as PW5 produced the post mortem report (PEX1) which was prepared by Dr. Anangwe, his colleague. According to Dr. Anangwe the cause of death was indicated as “increased intracranial pressure due to trauma due to the injury on the head.” The post mortem report was not contested by the defence and the same was accepted by this court as proof of cause of death.

20. The more difficult issue is whether the death of the deceased arose out of an unlawful act or omission on the part of the accused. In this regard, there is no dispute that just before the deceased dies, there was a serious altercation between the accused and his brother Fredrick. Although the two sides do not agree on the cause of that altercation, there is evidence showing that the deceased was at the centre of it. While accused threw a stone, aiming it at Fredrick, which hit the deceased on the forehead and brought her down unconscious. On the other hand, the accused says that the deceased fell down inside her house when Fredrick tried to force the door to the deceased's house open. According to the accused, the deceased fell down in the house after the door, which she was trying to keep closed gave way.

21. I have considered these rival positions and my considered view is that the evidence given by the prosecution witnesses as to what actually happened in the true version of the story.

22. Counsel for defence has cast doubt on the credibility of the witnesses and has also said that the evidence consists of numerous contradictions and discrepancies. It must be noted that every witness gives his/her testimony according to what his/her mind perceives at the time. The testimonies need not be congruent in every respect nor should the words used by the witnesses be similar. What I think is critical is that all the witnesses' accounts must point to the alleged thing or circumstances to which they all purport to testify. In the instant case, I am satisfied that all the witness accounts point to the fact that the accused threw a stone which hit the deceased and as a result thereof the deceased fell down unconscious and never recovered from that state of unconsciousness until she died. It is also my considered view that the accused's testimony was too exaggerated to be truthful, and the same has not dislodged the evidence given against him by the prosecution witnesses.

23. It is also interesting to note that the conduct of the accused after the deceased fell down unconscious betrayed him. Instead of assisting to take the deceased to hospital he ran away to the police, and one wonders why going to the police was of greater importance to him than assisting other family members to take the deceased to hospital. I am thus satisfied that the accused is the one who threw the stone that fatally injured the deceased and that in throwing that stone, whether it intended to hit the deceased or Fredrick he acted unlawfully.

24. The last issue is whether the prosecution has proved that the said act was committed with malice aforethought (mens rea). The term mens rea is defined by the Wex Legal Dictionary as follows;

“The state of mind indicating culpability which is required by statute as an element of a crime.”

25. Section 206 of the Penal Code defines malice aforethought as follows; “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 intention to commit a felony

d. An intention.....”

26. From the above definition Malice aforethought comprises not only intentional acts but also comprises reckless acts likely to cause death and/or grievous bodily harm with indifference of the consequences of such act.

27. From the testimonies by the prosecution and defence, it appears to this court that the events leading to the deceased's death took place suddenly and both the accused and his brother started baying for each

other's blood. Efforts were made to separate them, and indeed those efforts bore fruit, but the accused's anger never seems to have gone down, and in the heat of that moment, he threw stones at Fredrick, and one of the stones fell on the deceased, fatally wounding her. In my considered view therefore, the accused killed the deceased in the heat of the moment without the necessary malice aforethought.

Failure by the prosecution to call the investigating officer

28. It is submitted by the defence that failure by the prosecution to call the investigating Officer is fatal to the prosecution's case. As was held in the case of **Kiriungi – vs – Republic [2009] KLR 638.**

“It was good practice for prosecuting authorities to comply with the requirement to call an investigating officer as a witness but the mere failure to comply with it, could not automatically result in an acquittal. Each case had to be considered on its own circumstances in order to determine the effect of failure on the entire case for the prosecution,” and that an investigating officer only need to be called if there was an allegation that he would have said something adverse to the prosecution case.

29. In the instant case, I find no allegation that the investigating officer was not called because he could have said something adverse to the prosecution case. Nothing therefore turns on this complaint by the defence.

Conclusion

30. From all the above analysis, and by the powers conferred upon me by Section 179(2) of the Criminal Procedure Code, I find the accused Henry Anyinya Anyangu guilty of the offence of manslaughter and convict him accordingly under Section 322(2) of the Criminal Procedure Code.

It is so ordered

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

RUTH N. SITATI

JUDGE

In the presence of;

Mr. Ngetich.....for State

Mr. Amasakha for Mr. Aburili.....for Accused

Polycap.....Court Assistant