



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL DIVISION
CRIMINAL (MURDER) CASE NO. 51 OF 2009

REPUBLIC.....PROSECUTOR

VERSUS

JACOB MUSEE INGOSI ALIAS TONNY.....ACCUSED

J U D G M E N T

Introduction

1. The accused in this case, Jacob Musee Ingosi alias Tonny first appeared in court on 23.11.2009 before Hon. H.I Ong’undi Deputy Registrar (as she then was) for one reason or another, the accused did not take plea until 25.03.2010. The accused pleaded not guilty to the charge of murder contrary to section 203 as read with Section 204 of the Penal Code. The particulars of the charge as contained in the information dated 19.11.2009 are that JACOB MUSEE INGOSI alias TONNY, on the night of 20th and 21st October, 2009 at Bukukhumi Village Shing’oto Sub-location, Shibuye location in Kakamega East District within the Western Province jointly with others not before the court murdered John Mutsotso. The prosecution called 6 witnesses in an attempt to prove the charge of murder against the accused.

The prosecution case

2. From the 6 prosecution witnesses, the case for the prosecution is as follows; at about 2.00am on the night of 20th/21st October,2009 Juliet Itigo John, who testified as PW4 (Juliet) was asleep in her house at Shingoto village, she was together with her husband, John Mutsotso (deceased) and their children then she heard noises outside her house and she decided to light her “Koroboi” or tin lamp. Before long, about 10 people broke into the house through the front door people were armed with torches and they shone the torches around. Juliet testified that the accused was among the 10 people who broke into the house. She gave the name of the accused as Tonny alias Jacob. She also testified that all the 10 people were neighbours and that she knew them, and that she could see them well with the help of light from her “Koroboi” lamp and also because of light from the torches.

3. Juliet testified that she ran out of the house and went to hide in the bushes behind their house. When she returned to the house in the morning, she discovered the deceased had been taken to Mukumu Hospital. She went to the hospital and saw the deceased had cuts all over the body and had lost a lot of blood. The deceased told her that the young man had killed him. After 3 days at the hospital the deceased died.

4. Rosemary Alikumu, PW2(Rosemary) testified that at about 11.00 pm on 20th October, 2009 she was

asleep in her house when she heard noises from outside. Some of the voices were saying “we want to kill you.” She got up and opened the window and looked outside. Where there was bright moonlight and there were also torches being flashed around. As she looked out one of the young men told her to get out of her house if she wanted to be killed. The young men were all very close to the window out of which she was peeping. She was able to recognize Fredrick Denis, Jacob Musee (accused) Robert Isaack Salat and one Ben. Rosemary testified that she knew all the young men who were her neighbours and that it was Fredrick (still at large) who threatened her with death if she got out of the house.

5. She then saw the young men get into the deceased’s house. She immediately heard the iron sheets of the deceased’s house being cut and soon after she heard the deceased screaming for help. She also testified that she heard the young men shouting that they would kill him and she also heard the deceased saying that he was being killed.

6. In her further evidence in chief, Rosemary testified that the young men went to her brother’s house and started cutting down bananas as they screamed. At that point, Rosemary telephoned Moses, the father of the young men and informed him of what was going on. Moses came to the scene and when the young men saw him they dispersed.

7. After the attackers had run away, Rosemary and a son to the deceased started looking for the deceased whom they found lying down in the tea plantation with many cut wounds. The deceased’s son took him to Mukumu Mission Hospital, but after one week, the deceased died.

8. It was also Rosemary’s testimony that the deceased was able to talk while he was at the hospital, though he did not say why he may have been attacked. She also testified that while the other attackers managed to run away, the accused was arrested.

9. During cross examination, Rosemary stated that the moonlight was bright in the sky and further that the attackers remained in the compound from around 11.00am to 2.00am. Though she could not remember the clothing each of the six or so young men were wearing, she heard their looks and that she saw the accused among the attackers.

10. PW2 Vitalis Matekwa Ashiundu (Vitalis) testified that on the morning of 21st October, 2009, she was woken up by two women, Teresia and Margaret (not called as witnesses) who informed him about the attack on the deceased the previous night. He went to Mukumu Hospital where the deceased was hospitalized and on asking the deceased what had happened, the deceased named the following as his attackers. Fredrick Mutumbi, Bruce Mutumbi, Tony Ingosi (accused) Isaack Ingosi Robert Kanji among others. The deceased then asked Vitalis to report the matter to the police, which he did both to the chief and to the police. Vitalis also testified that when he visited the deceased’s home, he saw damaged iron sheets. He also testified that he has known the accused for the whole of his (accused’s) life and that they are cousins.

11. In his evidence in cross examination, Vitalis stated that the accused Jacob Musee Ingosi is also known as Tony and that he was together with Juliet when the deceased named his attackers and that he gave these names to the police.

12. The report to the police was received by Inspector Mwangi who was the Investigating Officer on whose behalf number 45571 Police constable Owino Asin, PW6 testified.

13. PW6 told the court that the report was made on 28th October, 2009. While Inspector Mwangi went to the scene, PW6 visited the hospital accompanied by Dr. Nyikuri who conducted the post mortem examination. PW6 could however not say how the accused was arrested but he stated that soon after the report was made the accused herein was taken to the Kakamega Police Station and charged with the current offence.

14. The body of the deceased was identified by Wycliffe Shasi Livusi, PW3 (Wycliffe) and Juliet on 28th October, 2009. Dr. Dickson Mchana, PW5 testified on behalf of Dr. Nyikuri who had since resigned

from Government service. According to the post mortem report, PExhibit 1, the deceased's body was very pale and had 3 stitched wounds. The first wound was on the back of the right hand and was curved. It measured 16cm long. The second wound was on the other side of the left hand measuring 6 cm. long the third was on the shoulder measuring 10 cm long. Dr. Mchana also testified that there were injuries to the blood vessels on the left arm. In the opinion of Dr. Nyikuri, the cause of death was severe blood loss due to cut wounds.

The Defence Case

15. At the close of the prosecution case, the accused was put on his defence though the prosecution case was heard by other judges who had since been transferred to other stations, I heard the defence case during which, the accused testified as DW1. He called one witness, Boniface Hason Ingosi as DW2.

16. In his sworn testimony the accused denied all the allegations made against him. He stated that on the night in question he was at a funeral within the village where he was cut by one Ken and thereafter he was taken to Mukumu mission Hospital where he was admitted for 2days. Upon discharge, he reported the matter to the police and was issued with a P3 form. He also testified that when he woke up at the hospital, he saw the deceased at the same hospital. According to accused, Ken is son to deceased and that he (ken) had also been cut for cutting accused. He produced the treatment notes and the P3 form as DExhibits 1 and 2. The accused stated that he was falsely accused of murdering the deceased because the deceased died before his (accused's) case with Ken had been investigated.

17. During cross examination the accused stated he had not reported the attack on himself because he has been in custody.

18. DW2 was Bonface Hason Ingosi. He received information on the night of 20th /21st October, 2009. That accused had been attacked at a funeral. He took accused to hospital and was later informed that the deceased's son Ken is the one who had assaulted the accused. He was also informed that the deceased had been attacked by a mob which had come from a funeral in the neighbourhood. DW2 confirmed that the accused informed him that Ken Mutsotso had attacked him while he (accused) was at the funeral.

Submissions

19. Mr. Nandwa counsel for the accused filed final written submissions dated 7th June, 2017. He urged the court to find that no sufficient evidence has been adduced by the prosecution to warrant the accused person being found guilty of the offence of murder. Counsel contended that the accused's alibi defence has not been shaken by the prosecution's case. He also submitted that the issue of identification which is central to the prosecution's case has not been settled, especially in counsel's view since no evidence was adduced to confirm the prosecution's contention that the accused was injured during the attack on the deceased.

Issues

20. For the prosecution's case to succeed the prosecution must prove the ingredients of murder as set out under the provisions of section 203 and 206 of the Penal Code;-

- a) That the deceased died and the cause of such death
- b) That the deceased died as a result of the unlawful act or omission on the part of the accused
- c) That the accused had malice aforethought in causing the death of the deceased.

21. Whether or not the prosecution has proved the above issues requires a closer examination of the prosecution case (Supra), since the burden of proof in criminal cases is always on the prosecution and never shifts to the accused who is under no obligation whatsoever to say anything in his defence.

Analysis and Determination

22. As regards the first issue there is ample evidence showing that the deceased died about a week after he was attacked and a post mortem examination was conducted on his body on 28th October, 2009, the same day the accused was taken to the police station at Kakamega. Dr. Mchana testified to this fact and produced the post mortem report which was filled signed and stamped by Dr. Nyikuri who conducted the post mortem examination. According to Mr. Nyikuri the cause of the deceased's death was severe bleeding due to cut wounds so, the first issue is concluded in the affirmative in favour of the prosecution.

23. The second issue is the mere troublesome one and this is because the attack on the deceased took place between 11.00 am and 2.00am on the night of 20th and 21st October, 2009. I am aware of the fact that where a case against an accused rests entirely or substantially on identification under difficult circumstances, and where the accused disputes such identification, the court has to exercise extreme caution before relying in such evidence for a conviction. In the instant case, the evidence on identification was given by Rosemary Juliet and Vitalis. According to Vitalis, the deceased gave him the name of the accused as having been among the people who visited panga cuts upon him (deceased). According to Rosemary she saw the accused among other young men just outside her window as they (young men) made their way to the deceased's house. Rosemary said there was bright moonlight in the sky and further that the young men also had torches which they were flashing around and that she was able to recognize the accused whom she knew very well as a relative and neighbour. Juliet also stated that when the attackers entered, she was able to recognize the accused, one Dennis and Bene and also one Rob. When Rosemary testified she said its the people she saw outside her window during the moonlit night. "I heard the noise outside some voices were saying, "we want to kill you" I got up. I opened the window and checked outside as there was bright moonlight. The torch light shone are of those people outside. The torchlight was on the young men were just outside my window. They were six in total. I could see them. I saw Fredrick, Denis, Jacob Musee, Robert, Isaack Salat and one "Bene" the young men were neighbours and I knew them. Fredrick who had the torch is the one who threatened me saying I would get killed if I go out."

24. According to Vitalis, the deceased who was in hospital gave him the same names when he named the six men who had attacked him. It is my considered view that in the absence of any evidence to suggest that the 3 witnesses held a conference to agree on the names to give to the police. I have no reason to doubt the testimonies in the 3 witnesses. I am satisfied that the accused was among the six or so young men who attacked the deceased, cut him up badly and only ran away when the father to some of them came to the scene after Rosemary had called him. I am further satisfied that even in the absence of the evidence of the said Moses, the accused has been pinned to the scene and his alibi defence cannot hold.

25. Further, according to Rosemary, the attackers descended on their compound at around 11.00pm on 20th October, 2009. It was about that same time that accused says he was attacked by Ken, son to the deceased. From the above evidence, I have drawn the inference that after he was attacked by Ken, his friends rallied around him and formed the common intention to kill Ken's father in retaliation. Infact throughout the evidence, there is no indication that there was any prior grudge between the deceased and the accused or their families, except for that incident involving the accused and the deceased's son Ken.

26. What am I saying? I am saying that the ac used was properly and positively recognized by Rosemary and Juliet as well as the deceased who gave the accused's name to Vitalis this was no mere coincidence. It is a proven fact. In the case of **Terekali & Another vs – Rex[1952] EA** -----, the court in considering the importance of a report said the following.

“Evidence of a first report by the complainant to a person in authority is important as it often provides a good test by which the truth and accuracy of subsequent statements may be gauged and provides a safeguard against later embellishment or made up case. Truth will always come out in first statement taken from a witness at a time when recollection is very fresh and there has been no time for consultation with others.....”

27. Though it may be argued that Vitalis was not a person in authority the information that he got from

the deceased about the attackers is the same information he relayed to the police after the deceased asked him to make a report to the police.

28. The last issue is whether the accused had the necessary malice aforethought when he and his accomplices attacked the deceased. From a superficial consideration of the case. It is clear that the prosecution has proved malice aforethought through the gravity of the injuries suffered by the deceased. Section 206 of the penal Code, which defines Malice aforethought provides as follows’-

“206 malice aforethought 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 or

(c) An intent to commit a felony

(d) An intention by the act or omission to

29. In the instant case, Rosemary testified that she heard the young men telling the deceased.” We want to kill you.” In pursuit of that intention, the accused and his accomplices cut the iron sheets from the roof of the deceased’s house broke down the door and entered the house before cutting him all over the body. It is my considered view that during the attack the accused and his accomplices must have known that their act of cutting the deceased with pangas would probably cause the deceased’s death or do him some grievous harm. The deceased died from these injuries as testified to by Dr. Dixon Mchana who produced the post mortem report prepared by Dr. Nyikuri.

Conclusion

30. Having made the above findings. I am satisfied that the prosecution has proved the charge of murder against the accused person beyond reasonable doubt. I therefore find the accused, Jacob Musee Ingosi alias Tonny guilty of the murder of John Mutsotso and convict him accordingly under Section 322(1) of the Criminal Procedure Code.

It is so ordered

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.....for State

Mr. Amasakha for Nandwa.....for Accused

Polycap.....Court Assistant