



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL DIVISION
CRIMINAL CASE NO. 47 OF 2011

REPUBLIC.....PROSECUTOR

VERSUS

MARK LUKOYE MASAMBAYA.....1ST ACCUSED

SIMON AKHALUMI MASAMBAYA.....2ND ACCUSED

J U D G M E N T

Introduction

1. The two accused persons are charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal code. According to the information Mark Lukoye Masambaya and Simon Akhalumi Masambaya on the 13th day of July, 2011 at Shikomoni Sub-location in Kakamega County Central District within Western Province, jointly murdered Robert Shisia Masambaya.

2. The two pleaded not guilty to the charge when the same was read to them on the 20.9.2011 in Kiswahili a language they said they understood. The matter then proceeded for hearing. M/S Amasakha Advocate was appointed to act on their behalf. They were both released on bond after their application for the same was allowed.

The Prosecution Case

3. The prosecution called a total of six (6) witnesses PW1 Joseph Nasambaya (Joseph) heard screams as he was going to his place of work early in the morning at 5:00am on 14.7.2011. He went where the scream was coming from which was near Siasuma River and with the help of his mobile torch light he saw the deceased who was screaming. The deceased's recognized him and called him "Mzee" and explained to him that his two brothers Mark Masambaya and Simon Masambaya had killed him. He told the court that the deceased stomach had been split and he had stab wounds all over the shoulder chest and ribs.

4. He explained that the deceased asked him to check for his belongings around the scene that is a bag containing his school items but he did not find any bag. Joseph then called his wife who called his (Joseph's) father and the wife of the deceased, who testified as PW2. They came to the scene and assisted in taking the deceased to the Kakamega General Hospital where he (deceased) succumbed to the injuries. Joseph also told the court that the deceased was a secondary school teacher and always carried a bag with him.

5. PW2 Brigit Masakwa Shisia (Brigit) testified that the deceased was her husband. On the 12.7.2011 the deceased left home at about 5.30am but never came back home that day. When he left the house the deceased had a bag "PEX1" which had his ID Card "PEX2" Mwalimu Sacco Card "PEX3" Equity Bank Card "PEX4" Books "PEX5" a diary "PEX6" and other documents "PEX 7" and his pays lips for May, 2011 and June, 2011 "PEX 8(a) and (b) plus a group Photo "PEX 9"

6. On the 14.7.2011 she was woken up by Joseph's wife and informed that her husband had been found at the river with serious injuries. Together they rushed to the scene and found the deceased. She saw that he had injuries, his intestines were outside, stab wounds on the stomach, hands chest and face. She rushed back home took a blanket which they used to carry him to the hospital. He was in pain and was wearing only a trouser. They took him to Kakamega General Hospital. While at the casualty ward, the deceased told her that it was the two accused persons who had caused the injuries, that the two accused had attacked him while on his way home at about 11.00pm the previous night. She identified the deceased for the post mortem examination. She also identified the deceased bag which was at the police station having been taken thereby the two accused persons who claimed that the deceased had attacked them.

7. PW3 No. 83192 PC Thomas Kikwai (PC Kikwai) was at the report office on 13.7.2011 at Amakunga police patrol base at around 2340hours when he received a report from the two accused persons claiming they had been attacked by the deceased who left behind a black bag "PEX 1". The two accused handed over the bag to him and he opened it in their presence and found the exhibits hereinbefore produced. He recorded the accused's statements in the occurrence book and advised them to seek treatment. He was able to observe their clothes which were heavily stained with blood. The first accused also had a bottle of Tusker which had blood stains. PC Kikwai took this bottle which he kept as an Exhibit the same was produced as PEXh 7.

8. The next day at around 07:30am a report was received that the deceased had been found lying by the road side and in a very bad state. He went to the scene in the company of two of his colleagues. They also passed through the second accused's house to see whether he would find their clothes to use them as exhibits but he found that they had already been washed and on the line. They tried the 1st accused house but found that he had also washed his clothes. He only took the first accused's tie.

9. PC Kikwai saw the deceased at Kakamega General Hospital and saw the injuries inflicted on him. Thereafter he started tracing the accused.

10. On cross examination by Mr. Amasakha, PC Kikwai confirmed his earlier testimony and added that the bag he was given may be described as a brief case handbag or a porch. He testified to the fact that the accused and the deceased were relatives and lived in the same compound/homestead.

11. PW4 was Asman Muriane Shisia, (Asman) the Assistant chief from Makunga Village in Kakamega. He identified deceased body for post mortem purposes. He was also among those who took the deceased to hospital on 14.07.2011 and he testified that the deceased told him that it was the two accused persons who had injured him. He stated that he was together with his sider bright when the deceased mentioned the two accused as his killers.

12. Jonathan Omusotsi Nyangala, PW5 (Jonathan) received the information that the deceased had been attacked. This was on the 14.7.2011 at around 6.00am and it was from one Patrick Maundu Kombo. He was taken to the scene at about 6.00am and they thereafter reported the matter to the police at Makunga. Jonathan is a village elder of Eludali "B" village. Jonathan stated that together with Kombo, they proceeded to the 2nd accused's house from where PC Kikwai collected some exhibits. The police did their investigations and eventually arrested the accused. He knew both accused.

13. Dr. Dixon Mwaludindi Mchana testified as PW6. He performed the autopsy on the body of the deceased and produced the post mortem report which he produced as an exhibit "PEX13". As a result of the examination, he formed the opinion that the cause of death was internal haemorrhage secondary to sharp object trauma following an assault. The prosecution closed its case.

14. This court found that the prosecution had established a prima facie case against the accused persons who were placed on their defence.

Defence Case

15. In their defence both accused persons raised an alibi. They called three witnesses to support their alibi. The deceased herein was their brother. DW1 stated that on the 13.07.2011 at 8.00 am, he left his house and went to Bungoma for a ceremony of welcoming his parents in the home. He was accompanied by the 2nd accused and three others. There were two ceremonies which they attended. The second ceremony took place on the 14.7.2012.

16. That they spend the night at Bungoma and after both ceremonies they left Bungoma at 4.00Pm. First accused who testified as DW1 claimed to have learnt of the death of the deceased on 14.7.2011 when he was arrested by PC. Kikwai. He denied the statement by PC.Kikwai that he went to report that he had been attacked and also denied involvement in the death of the deceased.

17. He claimed that he and the deceased had not met for a period of two months and maintained that they had lived peacefully with the deceased.

18. This was the same evidence given by Second accused who testified as Dw2. He too claimed that he went to Bungoma on the 13.7.2011 to attend a ceremony at his in laws. The ceremony took two (2) days and they returned on the 14.7.2011 in the evening when he learnt of the death of the deceased. He denied the allegations by PC Kikwai that they made a report at Makunga Police Station concerning an attack on them by the deceased. He also denied that he participated in the death of the deceased.

19. DW3 Isaiah Manyasi Waswa, (Isaiah) told court that he knew the two accused persons but he did not know the deceased. He testified that on the 13.7.2011 he had a ceremony at his home where he was welcoming his parents into his home. Since he had two wives he conducted two ceremonies one on the 13.7.2011 and the other on 14.7.2011. He testified that the two accused were present at the said ceremonies together with others. He was informed that the two accused had been arrested on the 15.7.2011.

20. DW4 Haron Saili (Haron) said he knew the two accused and had also met the deceased before. He testified that on the 13.7.2011 he was invited by first accused to accompany him for a ceremony in Bungoma. They went together to the home of Isaiah for some ceremonies which were held on 13.7.2011 and 14.7.2011. It was on the 15.7.2011 in the morning that he was informed that first accused had been arrested. DW5 Francis Omusotsi Sakwa was also invited for the ceremony by first accused and he attended the same in the company of the two accused, and Siali on 13.7.2011. They spent the night at the place and left the next day 14.7.2011 after attending yet another ceremony. He was informed that his in laws had been arrested on the 14.7.2011 at about 7.00pm. He went to Makunga Police Station the next day to confirm what the matter was. The defence closed their case after this witness.

Submissions

21. M/S Mukhwana submitted on behalf of the two accused. She submitted that the prosecution has failed to prove both actus reus and mens rea. That there was no eye witness account of any fight between the two accused and deceased. She submitted further the alibi defence also had not been challenged by the prosecution. She relied on the case of **Godfrey Ochieng Songa – vs – Republic- CRA. No. 199/2006** for the proposition that it is the state to displace the defence of alibi. Mr. Jamsumba submitted that they relied wholly on the evidence on record.

Issues for Determination

22. The issues for determination in this case are straight forward, with the burden of proof lying on the prosecution to prove its case beyond reasonable doubt. The burden of proof never shifts to the accused person. It is incumbent upon the prosecution therefore to prove the following pertinent ingredients of the

offence of murder;-

- a) the death of the deceased
- b) the cause of such death
- c) proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons and lastly
- d) Proof that the said unlawful act or omission was committed with malice aforethought.

Fact of death and cause of death

23. On the fact of the death of the deceased there cannot be any doubt. All the prosecution witnesses and even the accused persons testify that indeed the deceased died. The prosecution witnesses saw the deceased before taking him to hospital. Though the deceased was in bad shape, they spoke to him before his death and identified the body for post mortem. Dr. Mchana performed the autopsy on the body of the deceased and confirmed that indeed the deceased died. He also gave an opinion of the cause of death. He produced the post mortem report where he stated that the cause of death was internal haemorrhage secondary to sharp object trauma following an assault See PEX13.

Whether the deceased died as a result of the unlawful act or omission on the part of the accused

24. Having sufficiently proved the fact as well as the cause of death of the deceased, the prosecution is under a duty to prove that the accused persons before the court are criminally culpable for the act leading to the death of the deceased. They have to show that the two accused persons were guilty of a wrongful act or omission, the direct consequence of which was the death of the deceased. It is not in doubt that the deceased was attacked on the night of 13.7.2011 and 14.7.2011. There was no eye witness account to the said attack or assault. The deceased was just discovered by Joseph who was on his way to school early in the morning. Since the deceased had suffered serious injuries, Joseph called for help from his father and Brigit who is the wife to the deceased.

25. Joseph, Brigit and Asman all testified that the deceased told them that the two accused are the ones who had attacked him. This court has to determine whether what the deceased told the three witnesses amounts to a dying declaration. It is to be remembered that by its very nature, evidence of a dying declaration is circumstantial evidence.

26. The court has held that circumstantial evidence can be the best evidence since it is evidence of surrounding circumstances, but such evidence has to be cautiously received in the same of **Nduvya – vs – Republic [2008]KLR 135**, the court expressed itself this;

“Circumstantial evidence was often the best evidence of surrounding circumstances which by intensified examination was capable of accurately proving a proposition. However, circumstantial evidence was always to be narrowly examined. It was necessary before drawing the inference of the accused person’s guilt from circumstantial evidence, to be sure that there were no other co-existing circumstances which would weaken or destroy the inference.”

27. In the earlier case of **Mwendwa- vs – Republic [2006] 1KLR 133**, the court held inter alia that “to prove a case based on circumstantial evidence only, every element making up the unbroken chain of evidence that would go to prove the case must be adduced by the prosecution. Secondly, as is now settled law the chain must never be broken at any stage.”

28. The above stated principles are the ones to be applied in the instant case because there was no eye witness to the incident in which the deceased was injured.

29. Before I move to determine whether the prosecution placed before this court on unbroken chain of

circumstantial evidence, I must say a few things about dying declaration and whether what the deceased told Joseph, Brigit and Asman amounted to a dying declaration. In the case of Musili – vs – Republic [1991] KLR 322, the court held, inter alia, that

“1. The law in Kenya relating to acceptance of dying declaration as evidence is clear that whilst corroboration of statement as to the cause of death made by the deceased before his death is desirable, it is not always necessary in order to support a conviction.

2. Although there is no rule of law that to support a conviction there must be corroboration of a dying declaration. It is generally unsafe to base a conviction solely on an uncorroborated dying declaration.”

30. In Republic – vs – Pattni[2005] 1KLR 310, the court expressed itself thus on the evidential value of a dying declaration;-

“A dying declaration, in order to be accepted as evidence, must have been made by the deceased at the time the attack leading to his death was carried out.....and the deceased statement needed to be words by the deceased to the effect that the accused or someone else was killing him.”

31. In the locus classicus Okethi Okale & others – vs- Republic [1965] EA 555, the court of Appel for Eastern Africa stated the following in part of its judgment.

“It is not a rule of law that in order to support a conviction, there must be corroboration of a dying declaration (R.V – Elgin Odel (1943) 10 EACA 90) Re- Guruswami[1940] Mad. 158) and there may be circumstances which go to show that the deceased could not have been mistaken in his identification of the accused. (See for instance the case of the second accused in R.V. Elgin Odel (6) and R.V Epongu Weunyu (1943) 10 EACA 90.) But it is, generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person, made in the absence of the accused and not subject to cross-examination unless there is satisfactory corroboration.” (see also Dala Mkwai – v- R[1956] 23 EACA 613)

32. In the instant case, PC. Kikwai who was the investigating Officer testified as follows in part of his evidence in chief. “At around 07.30am. There was a report that a village elder from Shirakali Area----- that Robert Shisia (The deceased) was found at around 03.00 am lying in a very bad state just by the road side. He had been cut and he was crying that he had been killed by his brothers.” During cross examination, PC Kikwai stated the following with regard to the dying declaration by the deceased: “... The second report was by the village elder in the company of Patrick Macho Kombo. They met my Colleague who then called me to the station. The report was also put in the occurrence book. The village elder told me that the deceased had said it was his brothers who had killed him. That aspect was not booked and it is not my statement.....”

33. As stated earlier, evidence of a dying declaration is in the form of circumstantial evidence which of necessity must be contained in an unbroken chain. It is my considered view that the PC. Kikwai was under a duty to record in the OB NO. 10 of 13/07/2011 that the village elder told him that the deceased had mentioned that he had been killed by his brother. That evidence would have tied in very well with the other evidence he gave that the two accused took the deceased’s brief case to the police on the evening of 13.07.2011. this court has the gut feeling that the two accused had a hand in the death of deceased, but since the only evidence tendering to connect the two accused with the death of the deceased is the dying declaration made by the deceased, it would be unsafe to base a conviction of the accused on that evidence for the reason that it is not complete in itself. The conclusion on this issue is that the prosecution has not established beyond reasonable doubt that it is the two accused or either of them who inflicted the injuries upon the deceased from which the deceased died.

Whether the prosecution proved malice aforethought on the part of the accused.

34. The term malice aforethought or mens rea is defined as the state of the mind indicating culpability as

more specifically defined by Section 206 of the Penal Code as an element of crime, and the prosecution is thus required to prove that the two accused had a common intention to kill the deceased. However, having already reached the conclusion that the evidence tendering to connect the two accused to the death of the deceased as doubtful, it is not necessary to delve further into the issue.

35. Regarding the alibi defence, the court is of the view that if PC Kikwai had done his work as ought, that alibi defence of the two accused would have been thrown out through the window.

Conclusion

36. In the circumstances of this case, I find and hold that the prosecution has failed to prove the case of murder against the two accused to the required standard. Consequently, Mark Lukoye Masambaya and Simon AKhalimi Masambaya be and one hereby acquitted of the offence of murder in accordance with Section 322(1) of the Criminal Procedure Code.

37. Unless there is any lawful reason for holding them in custody, they are each to be set free.

Orders accordingly,

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 Accused persons

.....Polycap.....Court Assistant