



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL CASE NO.36 OF 2008

REPUBLICPROSECUTOR

VERSUS

1. ALFRED KACHOLA MAGE1ST ACCUSED

2. HERMAN KEVOGO MAGE2ND ACCUSED

RULING

1. The accused, **Alfred Kerogo Mage** and **Herman Kevogo Mage** have been arraigned before court on the information of murder contrary to **section 203** as read with **section 204** of the Penal Code. Particulars of the information are that on the 26th day of July 2008 at Ondeyo village, Mukingi sub-location Isava Location, in Vihiga District of Western Province, jointly with others not before court, murdered **Evans Aguya Imbalo**.

2. The accused pleaded not guilty to the information which triggered a trial in which the prosecution called seven witnesses and upon closing its case, the court has been called upon to determine whether the prosecution has established a prima facie case upon which the accused should be called to defend themselves.

3. The prosecution’s case is as follows; PW1, **Kepha Imbalo Nalo**, father to the deceased testified that on 27th July 2008 at about 7.30 p.m. he was with his wife Rhoda when he heard a neighbour screaming saying the deceased was being killed. He rushed to the road where the deceased was, near the home of one **Mage** and home to the accused. According to the witness, it was the accused, who were attacking the deceased. When he reached the scene, he found the deceased already attacked and injured. He was lying on the ground bleeding from the mouth and head. The persons he found near where the deceased was lying were, the first accused, second accused, Hudson Kwanyiru and their mother Florence. The 1st accused had a club and the 2nd accused a metal rod. According to this witness, the deceased’s cloths were soaked in blood. The deceased was taken to Mbale Hospital where he died later. The witness told the court that although it was a bit dark, he was able to identify the accused by means of light from a lantern he had carried with him. In cross-examination the witness told the court that he found the accused about 30 metres away from where the deceased was.

4. PW2, **Reuben Adede Alivaga** on his part told the court that on 26th July, 2008, he and the deceased were walking home and when they reached near **Kachola’s** home the accused and two other people he identified as **Kwayuru and Gisingira** emerged from the bush and stopped them. The accused told the deceased to repeat what he had said. The first accused had a panga while the 2nd accused had a metal rod. The first accused hit the deceased with the panga on the shoulder while Kwayiru hit him

(themselves) with the metal rod on the hand. The witness screamed and ran away. The deceased also started running away towards his home while the accused and their friends followed him. The witness told the court that he later went to hospital to seek treatment. He further told the court that he had identified the attackers by means of electricity light from neighbouring shops and recognised them because they were neighbours.

5. The next witness was **Dr Francis Odora Ouko**, (PW3) who testified that on 1st August, 2008 he performed a post mortem examination on the body of the deceased, a male African aged about 44 years at Vihiga District Hospital. According to the Doctor, the clothes the deceased had were normal. He estimated the time of death to be about 3 days prior to the post mortem examination. Externally, the body looked normal. Internally in the digestive system there was evidence of pus inside the abdomen and perforations in the small bowel. **The other system was normal. His opinion was that the cause of death was septicaemia (pus) shock due to peritonitis (injection) inside the abdomen.** The Doctor told the court that it was difficult to tell what had caused the perforations. He further told the court that he did not see any perforations from the external parts of the body. He signed the post mortem report which he produced as PEx1. In cross examination, the witness told the court that typhoid can cause perforations in the small intestines. He ruled out the cause of death to be from any kind of injury.

6. PW4, **Millan Lwigi Assava**, testified that on 26th July 2008 at about 7 p.m. he heard young men pass by his home saying that they would kill someone. He identified three young men as Kevogo Kiranjiru, Kachila and Asingira. At about 8 pm he heard screams from one Florence, mother to the accused encouraging them to beat someone. He then heard the deceased say he was being killed. He rushed to the scene and found the deceased on the ground while Kivayo was standing near the deceased. Members of the public came to the scene and the deceased's parents were also called. The deceased was taken home, while vomiting blood. They summoned a wheelbarrow and took him to Mbale Hospital where he was admitted, but died after two days. In cross examination, the witness told the court that the young men were two but said he did not find any of the accused beating the deceased. The deceased had already been attacked.

7. PW5, **Joseph Nyavulindi**, a village vigilante, on his part told the court on 29th July 2009 at about 1.00 pm, the people they had been looking for in connection with the death of the accused had been spotted and with the help of other villagers, they arrested the two accused and escorted them to the police station where they handed them over to the police.

8. PW6, **Juliet Khadenye**, testified that on 26th July 2008 at about 8.00 p.m. she was at home when she heard screams from a neighbour saying they are killing ... they are killing. She opened the door and rushed to the gate where she heard the voice again saying they are **“killing Evans.”** She rushed to the scene where she found the deceased (her father) lying on the ground. She found the 1st accused with a metal rod while the 2nd accused had a panga. They were beating her father who was lying down but ran away immediately she reached the scene. She raised an alarm attracting neighbours. The deceased was taken to the house and later to hospital Her father was bleeding from back of the head and the mouth. The witness told the court that she identified the attackers by means of electric light from surrounding buildings. Her father later died while in Mbale Hospital.

9. PW7, **Tom Ingaza Mugita**, testified that on 26th July 2008 at around 7.30 p.m. he heard a loud cry calling for help. He rushed to the scene and found **Reuben Adede** (PW2) lying down. He found other members of the public already at the scene and enquired from Reuben what had happened who told him that he had been attacked by the accused. He examined him using a torch and noted that his hand was swollen. PW2 told him that the deceased had also been attacked. The witness told the court that he went with other villagers to where the deceased was and found him on the ground unable to talk. The deceased had injuries on the back of the head. They took him to hospital but later learnt that he had died.

10. At the close of the prosecution case, both the defence and prosecution addressed the court, the defence saying that the prosecution had not made out a **prima facie** case while the prosecution maintained that it had. **Mr Aburili**, learned defence counsel, submitted that the evidence of the prosecution was full of

contradictions and that the accused were not properly identified. He took issue with the lighting at the scene since there was no clear evidence on how the accused were identified given that the incident took place at night. **“The condition of lighting was suspect,”** counsel submitted. On this counsel relied on the decision in the case of **Solomon Musyoka Ngula v Republic** [2006] eKLR. Counsel further submitted that the date of the incident was not clear in that whereas some witnesses referred to 26th July 2008 others said it was on 27th July 2008. He again referred to a decision in the case of **Musa Njuguna Gachuru and another v R** [1962] EA 673 on that point.

11. Learned counsel further attacked credibility of prosecution witnesses and cited authority on this to advance his submission that the prosecution had not established a prima facie case. He cited **Archibold** criminal pleadings practice and evidence (1977) and the decision in the case of **Ndungu Kamanji v Republic** [1979] KLR 282 for the proposition, that a witness in a criminal trial and on 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. Counsel referred to many other decisions and concluded by saying that there was no case to answer to require the accused to respond to and prayed that the accused be acquitted.

12. Mr Oroni on his part submitted orally that the deceased was attacked by the accused and two others not before court and sustained serious injuries from which he died. According to counsel, the accused were seen assaulting the deceased but ran away when members of the public arrived. The deceased later succumbed to the injuries at Mbale Hospital. The accused were later arrested by members of the public and arraigned in court. He therefore submitted that there was sufficient evidence to put the accused on their defence.

13. I have considered this case, the evidence by the prosecution and submissions by counsel on both sides. The prosecution is required to establish a prima facie case if an accused is to be put on his defence. A prima facie case was defined in the case of **Ramanlal Trambakal Bhatt v R** [1957] EA 332 where the Court of Appeal for Eastern Africa stated:-

“It may not be easy to define what is meant by a ‘prima facie case,’ but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”

14. In a criminal trial, the accused assumes no responsibility to prove his innocence. It is the duty of the prosecution to prove its case beyond reasonable doubt. This must be done through evidence which must point to the guilt of the accused if he is to be put on his defence to explain himself out. This standard of proof remains constant throughout the trial and at the conclusion of its case the prosecution must have laid before court facts that lead to the irresistible conclusion that the accused committed the offence with which he is charged. The court articulated the above position in the case of **Republic v Gachanja** [2001] KLR 428 when it said:-

“It is a cardinal principle of law that the burden to prove the guilt of an accused person lies on the prosecution. An accused person assumes no burden to prove his innocence. Any defence or explanation put forward by an accused is only to be considered on a balance of probabilities.”

15. The accused herein face information of murder contrary to **section 203** as read with **section 204** of the Penal Code. **Section 203** of the Penal Code provides as follows:-

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

A person is deemed to have committed murder if his act or omission caused the death of another person. However, such an act or omission should be accompanied by malice aforethought. Put differently, there should be **actus reus** and **mens rea**.

16. In a trial for murder the prosecution must lead evidence and prove the offence of murder beyond

reasonable doubt. The ingredients of murder that must be proved in order to obtain a conviction were well stated in the case of **Republic v Nyambura & others** [2001] KLR 335 thus:-

“There are three ingredients of murder which the prosecution must prove beyond reasonable doubt so as to have a conviction, namely;

a) the death of the deceased and the cause of that death

b) that the accused committed the unlawful act which caused the deceased’s death, and

c) that the accused had malice aforethought.

17. On the first ingredient, there must be evidence proving that there is actual death of a human being. This is done through production of a post mortem report. PW3 Doctor **Francis Odora** testified and produced an autopsy (post mortem) report, PEx1. He testified that he carried out an examination on the body, of **Evans Aguya**, at Vihiga District Hospital. From that evidence the witness confirmed that there was a body of the deceased which means a person had indeed died. There was death which satisfies the first ingredient of murder.

18. The next question that arises for determination is whether the accused caused the death of the deceased, through an unlawful act or omission. PW1 testified that he heard screams and went out to the scene where he found the deceased who had been assaulted by he accused. PW2 on the other hand said he was with the deceased when they were attacked by the accused and each of them injured. He identified the accused as the people who attacked them using both a panga and a metal rod. PW4 said he heard young men he identified as the accused, vowing to kill someone and later heard screams, and when he reached the scene, he found the deceased on the ground injured. PW5 is the one who together with members of the public arrested the accused in connection with the murder of the deceased and handed them over to the police. PW6, on the other hand said she found the accused attacking the deceased who was lying on the ground. He is said to have been bleeding from the back of the **head** and **the mouth**. He was taken to hospital where he later died. Finally PW7’s evidence was that when he arrived at the scene, he found the deceased on the ground, and unable to talk. He had been **injured on the back of the head**.

19. Despite the inconsistencies on the dates of the attack, which I do not find critical in the outcome of this case, there is credible evidence that the deceased was attacked, injured and taken to hospital where he later died. However the question is whether the accused caused the death of the deceased by unlawful act. The assault was an unlawful act perpetrated against the deceased, and all the witnesses agree that it was the accused who attacked the deceased. The accused were identified by all the witnesses being people from around. There was light which enabled identification. However, PW3, the Doctor who conducted the post mortem examination on the deceased’s body, ruled out physical injuries as the cause of his death. According to the Doctor, upon examination, he found perforations in the small bowel (small intestines) and some pus. The other parts of the body, including the head and chest, were normal. That means there were no injuries noted on those parts of the deceased’s body. His conclusion was that the cause of death was shock due to pus in those perforations. The Doctor was clear in his evidence, that there were no external perforations. Infact during cross examination, the Doctor admitted that **Typhoid can cause perforations in the small intestines** such as those found in the deceased’s abdomen. He also said that there were no perforation injuries in the external abdomen and therefore the cause of death **could not be due to any kind of injuries**.

20. The import of the evidence of this witness, was that the deceased did not die of injuries he is alleged to have sustained due to assault by the accused. This raises the question whether the body the doctor examined was that of the deceased herein. Although the Doctor mentioned the name of the deceased, **Evans Asuya** as the body on which performed a post mortem examination, the findings are not consistent with the injuries described by the witnesses. Witnesses said the deceased had injuries on the back of the head and mouth, while the Doctor found the head normal. PW1 said the deceased’s cloths were blood soaked, but the Doctor again found the cloths on the deceased’s body normal. There is no explanation for these discrepancies. Again no witness testified that he or she had identified the body of the deceased to

PW3 (the doctor) for purposes of an autopsy, raising serious doubts whether the body on which the doctor conducted the post mortem examination belonged to the deceased herein.

21. The purpose of a post mortem examination is to confirm the death of a person and the cause of such death. That is what was said in the case of **Ndungu v Republic** [1985] KLR 487 when the court observed:-

“Though there are cases in which death can be established without medical evidence relating to its cause, such as where there are obvious and gave injuries, medical evidence should still be adduced in such cases of the effect of such injuries as opinion expert evidence and as evidence supporting the cause of death alleged by the prosecution (emphasis). See also Chengo Nickson Kalama v Republic [2015] eKLR)

22. In the present case, the deceased did not die instantly. He died in hospital some three days after he had been attacked. That is why a post mortem examination was necessary to determine the cause of his death. Whereas the prosecution says the deceased was killed by the unlawful acts of the accused, the doctor held a different opinion which means the prosecution has not tenders credible cogent and reliable evidence to proved beyond reasonable doubt, that the accused were responsible for the deceased’s death.

23. The prosecution having failed to prove the second ingredient of murder, I do not find it necessary to be labour the third ingredient, whether there was malice aforethought. That question does not arise for determination in view of the doctors conclusion on the cause of death.

24. That being my view of the matter, and taking into account the totality of the prosecution’s evidence on record, and applying the cardinal principle in Criminal justice, that the prosecution has the solemn duty to prove its case against the accused beyond reasonable doubt, I am unable to find justification to call upon the accused persons to defend themselves. For the above reasons, the conclusion I come to is tht the accused have no case to answer and I acquit each of them of the information of murder. I order that they be set at liberty unless otherwise lawfully held.

Orders accordingly.

Dated and delivered at Kakamega this 18th May, 2016.

E.C. MWITA

JUDGE