



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CRIMINAL (MURDER) CASE NO.15 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

HEZRON MAINA WANGA.....1ST ACCUSED

CHRISTOPHER MANYASIA LUTOMIA.....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. The particulars being that on the 25/09/2013 at about 5.00a.m at Mwitokho village Esumeiya sub location in Navakholo District within Kakamega County jointly murdered Alphonce Wandera Masheti. They denied the charge.

2. From the evidence of the 10 witnesses called by the prosecution, the facts of this case are that on the evening of 24/09/2013, the deceased herein joined a group of young men at the home of Eunice Mulera (Eunice) who testified as PW3. Eunice is a changaa brewer and retailer and on that evening the people who were at her drinking den included the deceased. The two accused persons Karakacha Rekey Munywele, PW2 Nicholas Mukabana, PW4, Simon Otsiula, PW5 Benedict Sifuna Makokha PW6 Eunice and her children were also in the home.

3. In the course of that evening, the 1st accused is said to have referred to the deceased, PW2 and PW6 as “watu wepesi” or loosely translated as people of no substance. Though it is not quite clear from the various testimonies of the eye witnesses, a scuffle ensued thereafter between the deceased and the first accused. The second accused later joined them and the two of them cut the deceased on the head with a jembe. The deceased fell down and became unconscious. He did not recover even after being taken to the Kakamega County General Hospital for treatment. The deceased breathed his last on 25/09/2013 at about 5.00a.m.

4. From the evidence also by the time the deceased’s father Joseph Masheti Tonje, PW1 and the deceased’s brother Belly Lukuyani Masheti, PW7, arrived at the scene, the deceased was lying unconscious and unable to speak. The Police were called to the scene by Eunice and Number 72137 PC Wilson Rotich together with PC Wekesa (not called as a witness) went to the scene and saw the deceased’s body having injuries on the head. The Post Mortem examination was conducted on 27/09/2013 by Dr. Dixon Mchana Mwaludindi who testified as PW9. According to Dr. Mchana the

deceased had 3 stitched lacerations on the left forehead, 2 stitched lacerations on front of left leg, defence injuries on both forearms, extensive bleeding on scalp below the skin, triangular depressed skull fracture to the side of the back. He also had bleeding below and above coverings of the brain.

5. In the opinion of Dr. Mchana, the cause of death was severe head injury, secondary to blunt force trauma following assault.

The Defence Case

6. At the close of the prosecution case the two accused persons were found to have a case to answer. After the Court explained the provisions of Section 306 (2) of the Criminal Procedure Code the accused persons elected to give sworn evidence. Both accused persons admitted to have been at the scene of crime right up to the time when the deceased and Rekey, PW2 engaged in a quarrel over their presence at Eunice's home with the deceased asking PW2 whether he needed to travel to Eunice's home to get changaa. According to the 1st accused, the deceased and PW2 were engaged in a scuffle outside Eunice's house but they were separated and the deceased went home. He (1st accused) denied referring to the deceased as "mwepesi" and stated that after the deceased was led away to his home, he (1st accused) also left and boarded a bus to Nairobi since he was going back to work. He denied fighting with the deceased. He also denied hitting the deceased with a jembe handle. He also told the Court that they were good friends with the deceased. Though he did not attend the deceased's funeral.

7. The 2nd accused gave a similar version of the story as first accused's saying that at about 7.00p.m on 24/09/2013, he saw deceased come to the home of Eunice. Following an altercation between the deceased and PW2, the two of them went outside the house while the second accused remained inside. He only later learnt that deceased and PW2 were fighting. Eunice intervened after which deceased was taken away by PW5 and PW6. The 2nd accused said he also left for his home thereafter. He only learnt of the deceased's death the following day in the evening when the Police went to his home. Though he was arrested amongst other people who had been at the changaa den the previous night, he denied murdering the deceased adding that when he heard the Police were looking for him, he took himself to the Police.

Final Submissions

8. At the conclusion of the hearing Mr. Nyikuli for the 1st accused, submitted that the prosecution had not adduced any direct evidence linking the accused persons to the offence of murder. Further that the available circumstantial evidence should be treated with circumspection especially considering the fact that the deceased interacted with people other than the accused persons. Counsel also urged the Court to take note of the fact that all the persons who were at the scene that night were drunk. And finally Counsel urged the Court to make a finding that it is the deceased himself who provoked the circumstances leading to his death.

9. Mr. Shivega for the 2nd accused concurred with Mr. Nyikuli's submissions only adding that the prosecution in this case has not established its case against the 2nd accused person beyond any reasonable doubt. Counsel also urged the Court not to believe the evidence of Eunice, who escaped from her home after the deceased died. Mr. Shivega submitted that Eunice should have stood trial for the murder of the deceased.

10. Mr. Omwenga, Counsel for the State submitted that the prosecution had proved its case against the accused persons beyond any reasonable doubt. Counsel urged the Court to find that the evidence by Eunice was direct evidence linking the accused persons to the death of the deceased. Counsel also urged the Court to find that by running away after the deceased died the two accused persons clearly showed that they were guilty. Counsel finally urged the Court to find that the medical evidence placed before the Court was consistent with the description of the attack upon the deceased person.

Analysis and Determination

11. From the above evidence the issues for determination are:

- a. Whether the deceased died and what the cause of that death was.
- b. Whether the death of the deceased is attributable to an unlawful act or omission on the part of the accused persons or either of them and
- c. Whether, if (b) is in the positive the accused persons had the necessary malice aforethought in committing the offence.

12. In the case of **Nyabuti & another –vs- Republic [2009] KLR 409**, it was held, inter alia, that *mens rea*, which is an ingredient under Section 206 of the Penal Code, namely the carrying out of the unlawful act or omission is satisfied when there is evidence proving any of the circumstances set out under the said Section. Regarding the establishment of malice aforethought where it is shown that the attack on the deceased was spontaneous with no evidence of there having been a prior plan to attack the deceased it cannot be said that the killing was with malice aforethought. See also **Njogu –v- Republic [2007] 2 KLR 123**.

13. In the instant case and regarding the first issue, there is no doubt that the deceased died. All the witnesses testified to that fact, including PW1 who is father to the deceased. Dr. Mchana, PW9 also testified that he carried out the Post Mortem examination on the body of the deceased on the 27/09/2013 and established that the deceased had suffered serious injuries. Dr. Mchana stated that the cause of death was severe head injury secondary to blunt force trauma following assault.

14. The next and more troublesome issue is whether the prosecution has proved that it was the accused persons who assaulted the deceased and inflicted the injuries upon him. In my considered view, no such firm evidence has been given by the prosecution. The State submitted that Eunice gave direct evidence linking the accused persons to the attack upon the deceased.

15. I have carefully considered the evidence by Eunice but nothing in her evidence shows that the accused persons either jointly (as alleged by the prosecution) or singly were seen cutting the deceased with a jembe. I have also carefully considered the evidence by Rekey, PW2, as to how the deceased was attacked and I find them wanting. What I can say about the whole of the evidence in this case is that either the prosecution witnesses were too drunk to remember what happened, or there was a deliberate cover up during the investigations.

16. It would appear to me that there was a combination of poor memory and deliberate Police cover up during investigations. I have also considered the testimonies by the accused persons in their defence and find them wanting in truth, but the onus of proving the charge does not fall upon them but upon the prosecution. I therefore give the benefit of the doubt to the accused persons and make a finding that the death of the deceased person in this case is not attributable to any unlawful act or omission on the part of the accused persons either jointly or singly.

17. The final issue for determination is whether the prosecution has proved that the accused persons acted with malice aforethought in the circumstances of this case. What appears to have happened in this case was a free-for-all affair as exchanges passed between the deceased and other changaa revelers at Eunice's den. It also appears that the attack on the deceased by whoever it was, was spontaneous after the deceased had allegedly referred to some of the revelers as "wepesi".

18. The prosecution did not in fact try to establish that the accused persons had hatched a prior plan to kill the deceased, although if there had been evidence by reliable eye witnesses, of the accused persons hacking the deceased with a jembe, malice aforethought would have been proved. The accused persons must walk away free for lack of sufficient evidence connecting them to the murderous death of the deceased person herein, although I suspect that the two accused persons had a hand in the matter. But suspicion alone, no matter how strong it may be, cannot be a basis for finding an accused person guilty.

Conclusion

19. From the foregoing, I have reached the conclusion that Hezron Wanga and Christopher Manyasa Lutomia are not guilty of the murder of Alphonse Wandera Masheti. I therefore acquit each one of them of the charge under Section 322 (1) of the Criminal Procedure Code. Unless otherwise lawfully held, both accused persons are to be released from prison custody forthwith.

20. It is so ordered.

Judgment delivered, dated and signed in open Court at Kakamega this 23rd day of June 2016.

RUTH N. SITATI

J U D G E

In the presence of:

Mr. Oroni (present) for State

Mr. Nyikuli (present) for 1st Accused

Mr. Nyikuli for Shivega for 2nd Accused

Mr. Lagat - Court Assistant