



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 106 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

EDWARD EMUSINGE NANDUKULE.....1ST ACCUSED

JOEL KIMATHI KILAKU.....2ND ACCUSED

JUDGEMENT

Introduction

Edward Emusinge Nandukule (1st accused) and Joel Kimathi Kilaku (2nd accused) are jointly charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. Particulars of the charge are that on the 24th day of October 2014 at Kasarani area in Kasarani District within Nairobi County murdered Wilberforce Wamori Wakaba, the deceased.

Prosecution Case

To support the charge, the prosecution called a total of nine (9) witnesses: Mary Muthoni Wamori (PW1) wife of the deceased; Dr. Oduor Johansen (PW2) the pathologist; Alex Kamau Wakaba (PW3) brother of the deceased; Stephen Mwangi (PW4) a scrap metal dealer based at Kasarani; CIP Ochieng Auka (PW5) the officer in charge of transport attached to GSU Recce Camp Ruiru; Sergeant Johana Ngerich (PW6) officer in charge of the armory at GSU Recce Camp in Ruiru; Sergeant Thomas Ruto (PW7) officer in charge of the records registry at the GSU Recce Camp Ruiru; CPL Churchill Owili of CID Kasarani and PC Nicholas Wambugu (PW9) a scenes of crime officer attached to Kasarani Police Station.

Witnesses testified that on 24th October 2014, the deceased, who operated a scrap metal business in Mathare Nairobi, went to pick scrap metal in Githurai leaving his wife operating their business. He drove motor vehicle registration number KBR 528B Toyota Landcruiser. Around mid-day the deceased called his wife and informed her that he had been arrested by three police officers on allegations of driving a motor vehicle with fake registration number plates and for having in his possession copper wire. The deceased told the wife that the police officers were asking for Kshs 30,000 after negotiations. This was allegedly an incentive to the police officers in order to release the deceased. PW1 told the deceased that she did not have the money. She advised him to go to Stephen Mwangi, PW4, a scrap metal dealer based at Kasarani, to ask him to assist the deceased with the money.

PW1 testified that the deceased later told her that he had gone to PW4 who had given him Kshs 30,000; that he decided to give the police officers Kshs 15, 000 and returned the other half to PW4 because the police had assaulted him; that the police took the money and copper wire and left.

On getting back to their business, the deceased told PW1 that he had been assaulted and his head was aching. She gave him Hedex pain killer and advised him to go to hospital. The deceased declined to go to hospital claiming that he wanted to follow up the police officers to reclaim his money and copper wire. The deceased did not go for treatment on that day or at all. On 30th October 2014, six days after the alleged assault, the accused went to an Equity ATM Agent at 1.00pm intending to withdraw some money. He was in the company of Esther Wanjiru, sister to PW1 (not a witness). The deceased had complained of headache that morning. Shortly after they left, Esther called PW1 and told her that the deceased had collapsed at the ATM. PW1 rushed to the place and took the deceased to Marura Nursing Home in Mathare where the deceased was pronounced dead on arrival. After investigations the two accused persons were arrested and charged. Court was told that they were implicated in this matter after phone call data led police to the two.

Further evidence by the prosecution shows that on 24th October 2014 the 1st accused, who worked as a driver at GSU Recce Camp in Ruiru was assigned security duties to secure the road from State House to the roundabout near Jomo Kenyatta International Airport (JKIA) for the President's tour. He was driving motor vehicle registration number GK B706E Toyota Landcruiser pick-up mounted with a siren. Court was told that this vehicle left GSU Recce Camp at Ruiru at 6.00am and returned at 10.55am. The 2nd accused was on leave at the time of this incident.

Defence Case

Both the accused persons gave unsworn defence. The 1st accused told the court that on 24th October 2014 he was assigned to drive motor vehicle number GK 706E and left in company of the commander of the vehicle one SS Yiegon and 6 other officers; that they had been assigned to Presidential coverage; that they accomplished that mission around 9.45am and he picked SS Yiegon and other officers and returned to the Camp at Ruiru; that he arrived at the Camp at 10.45am, recorded his return in the Occurrence Book No. 40/24/10/2014, parked the vehicle and went home to have early lunch and rest. He said he left the key of the vehicle with one CPL Justin Kimwele.

He testified further that on 6th November 2014 he received a call from the DCIO Kasarani Mr. Vitalis Obore asking him if he knew the 2nd accused person. He confirmed he did; that the DCIO told him to look for the 2nd accused and both report at Kasarani Police Station; that he called the 2nd accused who informed him that he was on leave; that on 8th November 2014 both 1st and 2nd accused reported at DCIO's office but found him absent, they were referred to CPL Churchill Owili (PW8) who placed them in police cells without giving them the reasons for this. He said that they learned later that they had been charged with murder.

The 2nd accused testified that he was on leave from 21st October 2014 but on 24th October 2014 he was at Ruiru Camp; that he went to Egerton University Town Campus located at View Park Towers to check on his exam results transcripts; that he returned to Ruiru Camp to prepare himself to leave on 25th October 2014 to go to Homa Bay where his wife worked to visit her; that on 6th November 2014, while in Homa Bay, he received a call from the 1st accused who informed him that the DCIO Kasarani wanted to see them; that he travelled to Nairobi and on 8th November 2014 they went to Kasarani Police Station where they were placed in cells without being given reasons and later were informed that they had been charged with murder.

Submissions

The prosecution submitted that they have proved that the deceased died due to injuries he suffered to his head and that those injuries were caused by the accused persons who have been positively identified. They submitted that the 1st accused was assigned to drive motor vehicle No. GK 706E which was identified by PW4 as the vehicle driven by 1st accused on 24th October 2014; that PW5 confirmed assigning that vehicle to 1st accused person on that date; that there is no doubt that the two accused

persons were together on 24th October 2014 and also communicated with each other. The prosecution submitted that the defence by the two accused persons is a mere denial of material facts; that all the evidence points to the two accused persons as the persons who assaulted the deceased and inflicted head injuries on him that caused his death a few days later; that the assault on the deceased's head is proof that the two accused persons had malice aforethought. The prosecution urged that it has proved its case beyond reasonable doubt and asked the court to dismiss the defence of the two accused persons and convict them accordingly.

On the other hand the defence has submitted that the prosecution has failed to prove murder against the accused persons; that the prosecution has failed to avail crucial witnesses who were present when the deceased purportedly collapsed and was taken to hospital. The defence named one Jacob mentioned in evidence as having allegedly accompanied the deceased when he went to report the matter to the police after his copper wire was allegedly taken by the police officers. They named Esther Wanjiru as another witness who had accompanied the deceased to the Equity ATM Agent and did not record a statement or testify; they named Makena Bundi a key witness whose evidence was crucial to prosecution case as she was said to have been in deceased's company when he was allegedly arrested by police. The defence submitted that Makena was better placed to identify the persons who allegedly arrested the deceased.

The defence further submitted that according to the evidence of PW2 the deceased died of intra-cranial pressure due to possible trauma to the head; that the death of the deceased is yet to be proved by prosecution as the evidence of the doctor failed to shed light on the cause of death of the deceased. The defence cited the cases of **David Omboto Serengeti v Republic Criminal Appeal No. 355 of 2006 [2009] eKLR**; **R v Lawrence Ngari Mbuko Criminal Case No. 4 of 2006 [2007] eKLR** on the issue of inconclusive medical report on the cause of death.

The defence further submitted that the doctor on cross-examination testified that there are many causes of intra-cranial pressure and that he did not investigate other causes; that the deceased collapsed before he was pronounced dead and this could have caused the injury to the head; that the investigating officer, PW8, did not inform the accused persons what he was investigating which is an illegality and that he gave hearsay evidence since he did not carry out any investigations. It was submitted that PW8 was prejudiced against the 1st accused having worked with him at Kasarani before this incident and that it is incorrect to state that the accused persons were positively identified; that PW4 did not identify the 1st accused and that he contradicted himself by stating that the 1st accused was wearing a long khaki jacket; that this could not have been true since PW5 testified that the 1st accused was on duty that day and he returned to the Camp at 10.35am; that he could not have been seen by witnesses at mid-day on that day; that the evidence has many gaps to warrant a finding of guilty for murder against the accused persons. The defence relied on **Athuman Shushe Bahola v R Criminal Appeal No. 17 of 2013 [2014] eKLR** and **John Nduati v R Criminal Appeal No. 121 of 2014 [2016] eKLR** on circumstantial evidence.

Analysis and determination

The law places the onus of proving the crime of murder on the prosecution who must prove the crime beyond reasonable doubt. The defence does not bear any responsibility of proving the innocence of the accused person. In a murder case, the prosecution must prove that there is death of a human being (person); the accused person before the court is the one who caused that death by an unlawful act or omission and that in causing that death the accused intended that death, that is, he had malice aforethought. Malice aforethought is defined under Section 206 of the Penal Code to include the intention to cause the death of or do grievous harm to the person.

I wish to determine this matter by addressing my mind to the following three main issues:

- I. Whether the death of the deceased occurred?
- II. If yes to the first issue; what or who caused that death?

III. Did the person that caused the death of the deceased person intend to cause it?

Without taking much time on the issue as to whether the death of the deceased occurred, it is my finding that there is evidence to prove it did. The fact of the death of Wilberforce Wamori Wakaba has been proved beyond reasonable doubt. Dr. Oduor, PW2, confirmed the death of the deceased and told the court that in his opinion, after examining the body of the deceased, the cause of death was raised intracranial pressure (swelling) due to possible blunt trauma to the head. These findings are not contested by the defence. However, the cause of those injuries is contested.

On the second issue, evidence shows that the deceased claimed to have been assaulted by the alleged police officers who had arrested him. He did not go to hospital for treatment but decided to take pain killers and pursue the said police officers to recover his goods and money. He continued working and evidence from the wife and PW4 shows he continued driving his car. On 30th October 2014, six days after the alleged assault, the deceased is said to have collapsed while at the Equity ATM Agent's. The circumstances of that collapse are not clear and were not stated to the court. What made the deceased to fall? How did he fall? Did he hit his head against the ground or any other hard surface? Did he lose consciousness?

These questions have no available answers. There is no evidence on the condition of the deceased on the days following the alleged assault and particularly on 30th October 2014. He did not seek medical attentions for the headache he claimed he was suffering. The pathologist's findings are that the swelling in the deceased's brain was due to possible blunt trauma. He was cross-examined on his findings and he told the court that there are other causes of swelling of the brain including lack of oxygen. The doctor also told the court that swelling is progressive and he was not able to tell when the swelling started. This is the reason the defence counsels took issue with the medical evidence that it is not conclusive as to the cause of death. I will come back to this issue in my conclusions.

The identity of the person(s) who assaulted the deceased is in issue. It is not true as submitted by the prosecution that PW1 identified the accused persons. PW1 was not at the scene and most of her evidence is based on the information she said she got from the deceased.

The only witness whose evidence comes close to this issue of identification is PW4 Stephen Mwangi. He testified as follows:

“On 24th October 2014 around 11.30am I was at my business working. I received a call from Manase deceased. I later knew him as Wilberforce. He told me he had been arrested by CID from Headquarters with copper wire. He told me he was near my business and I go out (sic). I went out and saw 2 landcruisers, one GK vehicle, the second belonged to Manase. The GK one was white in colour. Manase told me to give him 30,000 to give to the officers. I gave him 30,000 and he returned to the officers. He came back after a while and he told me he was not going to give police all the money because they had beaten him. He would give them Kshs. 15, 000. They had stopped at Seasons Supermarket across the road from by business. He told me the bigger officer had beaten himI saw one of the officers – the big one. He came out of the car and I saw him. He is the one in the dock wearing a red shirt.”

On being cross-examined he told the court that:

“I only saw one person who had come out of the GK vehicle. I can see him in court. I have not seen him after this. He was wearing a jacket. It was a khaki jacket. He was not in police uniform. I would have known him if I had met him after this. He came out of the vehicle and monitored Manase's movements.”

Other than this evidence, the only other evidence connecting the accused persons with this offence is that of PW8, CPL Churchill Owili. His evidence is that he interrogated the two without disclosing the reasons for this. In fact he misled them to believe that he was investigating an assault complaint. After they recorded their statements under enquiry, PW8 disclosed to them that they were suspects in a murder. The

defence took issue with this and submitted that PW8 infringed on the constitutional rights of the accused persons. The statements allegedly recorded by the accused persons are not part of the evidence before me so I cannot tell what information they contained.

The relevant part of PW8's evidence is that the two accused persons communicated on phone on 24th October 2014. It also shows that the phone No. 0722445914 allegedly belonging to one Makena Bundi was used to call the 2nd accused. What was contained in that conversation if this court were to believe this evidence? I have no answer to this question.

Tied to this issue is the matter of crucial and relevant witnesses who were left out of testifying. This issue was picked by the defence and I agree with them. Several witnesses have been mentioned in evidence but were left out by the prosecution. These include one Jacob who is said to have accompanied the deceased when he went to report to the police and thought twice about it and failed to report; Esther Wanjiru, the sister to the deceased's wife who accompanied the deceased to the Equity ATM Agent. Esther was present when the deceased collapsed at the ATM; there is also the Agent herself who was present at the ATM. There is also one CPL Justin Kimwele to whom the 1st accused handed over the key to motor vehicle after returning to Ruiru Camp; there is SS Yiegon, the officer in charge of 1st accused's vehicle. He is said to have accompanied the 1st accused on Presidential Security Coverage duties and finally, the key witness Dorothy Makena Bundi who was said to have been in company of the deceased during the alleged arrest and who is said to have called the 2nd accused person. Court was told that she recorded her statement with the police. It is not clear why the Investigating Officer did not seek a warrant of arrest to bring her to court if all else had failed! Due to the failure to bring the above witnesses to court, crucial evidence was unavailable to this court.

Evidence by CIP Ochieng Auka is that he found the vehicle the 1st accused was driving had returned to the Ruiru Camp by 10.55am. He said that he was not aware that the vehicle left the Camp after this. If this vehicle left the camp, then it must have been authorized to leave. Investigations, if properly conducted, would have proved this was the case. If the 1st accused, who was on official duty that morning, returned to the Camp, booked himself back, changed from his official uniform, took the vehicle and went out to do his own errands, then there is no evidence that this happened. The record of the goings and comings of the vehicles at Ruiru Camp was not tendered in evidence to show whether the accused booked himself out of the Camp after he returned from duty.

Even though the defence has submitted on circumstantial evidence, it is my considered view that this case relies heavily on the identification of the accused person(s). Solve the problem of the identity of the person(s) who assaulted the deceased; solve the issue of the cause of death of the deceased by connecting the allegedly assault with the accused persons or any of them, and the cause of death as resulting from that assault and this case would be as good as resolved.

I have carefully read the cited authorities on the identification and circumstantial evidence. I agree with the Court of Appeal in those authorities. Relating those authorities to this case, it is my finding that the evidence falls short of positive identification of the accused persons or any of them. PW8 was not a good witness. He was in a hurry to fix the accused persons no matter what the circumstances, hence his disregard to the law. He failed to properly investigate this case and failed to call crucial witnesses.

Further to the above, the issue of the cause of death is not conclusive and on this I agree with the defence. It is painful to lose a loved one in such circumstances, but the law must be followed in bringing the culprits to book. If the doctor confirmed that the deceased died due to the swelling of the brain and this was found to be associated with the assault on 24th October 2014 and had the accused persons identified to be the ones who assaulted the deceased, then the findings of this court would have been different. As the evidence stands, it contains gaps that are fatal to the prosecution case.

After careful analysis of the evidence, submissions and cited authorities, it is my finding, and I so hold, that the prosecution has not proved this case beyond reasonable doubt. I have highlighted the areas with gaps, the issue of the cause of death and the identification of the persons who arrested the deceased and

assaulted him. A criminal case can be won or lost at the investigations stage or at the prosecution stage or at both stages. It is my view that this case was lost at the investigations stage.

In conclusion therefore, I find that the accused persons have not been positively identified as the persons who arrested the deceased and assaulted him. I find that the evidence does not prove beyond reasonable doubt that the cause of death of the deceased is conclusively due to the allegedly assault. Consequently, it is my finding, and I so hold, that the prosecution has failed to prove the offence of murder against the accused persons or any of them. The law dictates an acquittal in such a scenario as this one. In obedience to the law, I hereby acquit Edward Emusinge Nandukule and Joel Kimathi Kilaku of the murder charge facing them. They are free to go home and enjoy their liberty and shall not be held in custody unless for any other lawful cause. It is so ordered.

Dated, signed and delivered this 24th November 2016.

S. N Mutuku

Judge

In the presence o

Ms Nduati for the prosecution

Mr. Muchiri and Mr. Webale for the accused persons

Mr. Edward Emusinge Nandukule, 1st accused person

Mr. Joel Kimathi Kilaku, 2nd accused person

Mr. Daniel Ngumbi, Court Clerk