



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO. 49 OF 2012

REPUBLIC..... PROSECUTOR

VERSUS

CHENGO KAINGU KARISAACCUSED

JUDGMENT

CHENGO KAINGU KARISA hereinafter referred to as the Accused is charged with the offence of murder contrary to section 203 as read with Section 204 of the Penal Code.

The particulars are that:-

“On the 24th day of June, 2012 at Mwamba ya Nyundo Village, Kaya Fungo Location, Kilifi County, jointly with another not before the Court murdered CRISTOPHER GONA TIMOTHY”.

The prosecution called seven (7) Witnesses in support of their case with the defence calling one(1).

On the 24th day of June, 2012 funeral rites were being held at the Homestead of **MWAKAMSHA KARISA KAMBI (PW 5)** for his father who had passed on. It is on the same night that one **CHRISTOPHER GOA TIMOTHY** was stabbed with a knife and succumbed to the injuries.

The only eye witness is **PW 5 (F K K)** a lad of fourteen (14) years at the time. He told the Court in his evidence in chief that at about 1:00 a.m that night he saw the Accused and the Deceased pushing each other at a nearby cashew nut tree. He went and separated them but the Deceased followed the Accused, after a while he saw the Deceased bend down. He decided to go and report the matter to his older brother. They went for a torch and upon returning found the Deceased lying on the ground with stab wounds on the stomach.

The offence of murder is defined under Section 203 of the Penal Code thus,

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

Malice aforethought is defined under Section 206 of the Penal Code in the following manner,

“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 mission 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 harm is caused or not, or by a wish that it may not be caused;

(c) An intent to commit a felony;

(d) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony”.

In the present case there is no dispute as to the cause of death, which was established as cardio pulmonary arrest due to haemorrhagic shock due to stab wound lower abdomen.

The murder weapon which was a knife was produced as exhibit number 1 for the prosecution.

The main issue in this case is that of identification.

This incident took place at night at around past midnight.

During cross-examination PW 3 told the Court that during funeral ceremonies they usually light fires because of darkness.

PW 4 also during cross-examination did testify that they had to use the services of a torch so as to identify the body which was lying on the ground.

PW 5 had testified of having seen the Accused struggling and pushing the Deceased. He in the same breath testified to have gone for a torch so as to help find the Deceased.

From the above it is sufficiently clear that this incident took place at a dark night. None of the witnesses has alluded to there having been moonlight. No source of light is mentioned apart from fires lit in the vicinity. PW 5 has not testified of having seen the Accused stab the Deceased. He only states that he had seen the two pushing each other before he decided to go and report the matter to his elder brother only to return and find the Deceased lying on the ground dead.

Its instructive to note that when police visited the scene of the murder which was at a funeral ceremony nobody mentioned the killer or killers of the Deceased. When the body was taken for post mortem examination on the 27th day of June, 2012 the post mortem report indicates that,

“The Deceased person was found stabbed with a knife on the stomach and neck by unknown persons”.

The Accused is charged with murdering the Deceased on 24th June, 2012 yet he was arraigned in Court on 11th September, 2012 a duration of close to three (3) months.

The investigating officer did not disclose at what time did PW 5 F K inform him of the murderer,, but he did concede during cross examination that when they visited the scene nobody volunteered to give them information. The Accused in his sworn statement did tell the Court that he was summoned to Kizurini police station on 21st August, 2014 interrogated and told to go home.

He was summoned three (3) more times before he was placed in cells on 10th September, 2012 and arraigned in Court the following day on 11th September, 2012.

Its apparent in this case that police were presented with difficulties because of lack of eye witnesses

in a murder case which took place in a funeral ceremony where it is said that there were many people in attendance. That lack of evidence informs their delay in charging the Accused even after summoning him to their station on more than three (3) occasions.

Going by the evidence of the prosecution Witnesses the offence took place on a dark night and visibility was poor necessitating the use of torches.

I do find that the circumstances surrounding the commission of the offence of this murder did not afford an enabling environment for clear identification of the attacker or attackers. This case has not been proved beyond reasonable doubt as required by law. The Accused is acquitted of the information of murder contrary to section 203 as read with section 204 of the Penal Code. He is set at liberty unless otherwise lawfully held.

Judgment delivered dated and signed this **24th** day of **February, 2015**.

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M. MUYA

JUDGE

24TH FEBRUARY, 2015

In the presence of:-

Mr. Masila for the State

Accused in person

Counsel absent