



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CR(MURDER) CASE NO.13 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

JAMES NDEDA MAYIYA..... 1⁵¹- ACCUSED

BENARD ALIYA NATSE..... 2ND ACCUSED

JUDGMENT

Introduction

1. The two accused persons, James Ndeda Mayiya and Benard Atiya Natse 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 8th day of December 2008 at Kitambazi village, Tambua location in Vihiga District within Western province, jointly with others not before Court murdered Alex Vusera. They both denied the charge and the case has been ongoing since 18/10/2010. Mr. Fwaya, Advocate has represented the two accused persons throughout the trial.

The Prosecution Evidence

2. The Prosecution case is brief. The Prosecution called 6 witnesses and from their testimonies the story runs thus: On 08/12/2008 at about 3.00p.m Jane Muhonja Orago, who testified as PW3 was at her home preparing some food for her family when she heard noises from the house of one Eliakim Inzelu. Inzelu's home was about 70 — 100 metres away from her own home. She also heard voices saying, "I am taking you home". According to PW3, those voices belonged to Sijenge Benard Jared and Obindi. Benard is the second accused in this case. PW3 testified that she recognized the voices of all the people because she knew them all. In the evening, she went to sleep and at about midnight two Police officers who were one accompanied by Eunice, a lady who had gone to PW3's garden earlier in the day. The Police took her to the scene where the body of the deceased lay. During cross examination, PW3 stated that when she heard voices, she also saw the 1st accused who was drunk, She also said she saw the deceased who was also drunk from traditional brew which had been brewed at the home of Eliakim.
3. Dr. John Kaguthi testified as PW2. He produced the Post Mortem report on behalf of Dr. Francis Odera who performed the Post Mortem examination on the body of the deceased on 17/12/2008 after the body was identified by Elizabeth Makungu, PW1 who was mother to the deceased. According to the Post Mortem report which was produced as PExhibit 1, the deceased's body had

a deep cut wound on the left parietal region of the head. There were also multiple bruises all over the body. There was a fractured skull which exposed the brain. According to the Post Mortem report, the cause of death was severe head injury. Jackson Odenyo, an uncle to the deceased and who testified as PW6 accompanied PW1 on 17/12/2008 and identified the body of the deceased.

4. PW4 was number 2007118901 APC Kenneth Ouma of Hamisi DC's office. He told the Court that at about 11.00pm on 08/12/2008 while he was on duty, at the DC's office, he received a report of the deceased's death. He was also given the names of 4 suspects namely Obindi, Tepu, Obembo and Ndeda. In the company of other officers and the area DO PW4 proceeded to the scene of crime where they saw the deceased's body which had bruises on the back. PW4 arrested the 1st accused and later handed him over to the Police.
5. PW5, Number 38615 Police Constable Aggrey Munyasia of CID Vihiga received a report of the deceased's death on 09/12/2008. He proceeded to the scene in the company of the DCIO Vihiga, Albert Tawaya and saw the body of the deceased. The body had a deep cut wound on the head. PW5 recorded statements from possible witnesses and thereafter re-arrested the 1st accused from the Administration Police.

The Defence Case

6. The 1st accused, James Ndeda Mayiya⁻ gave unsworn evidence and told the Court that on 08/12/2008, he left home early in the morning and went to work. He stated that he used to work as a mason. He returned home from work at about 5.00pm and after he had eaten, he went to sleep but at about midnight there were knocks on his door. When he opened the door he was confronted by Police officers who arrested him and took him to Vihiga Police station. Later he was taken to Court and charged with the present offence. The 1st accused asked the Court to carefully consider both sides of this case. The 1st accused did not call any witnesses.
7. The 2nd accused, who had initially indicated he would give unsworn evidence gave sworn testimony. He stated that at the time of the alleged offence, he was aged 17 years and a standard 8 primary school pupil. He testified that while he was going home from school on 25/05/2010 at about 8.00pm he was stopped by 2 Administration Police officers who arrested him for reason that he was walking hurriedly. He further stated that he was later taken to Vihiga Police station where he remained detained until 16/06/2010 when he was taken to Court and charged. He denied committing the offence whether alone or with others. He also stated that he only met the 1st accused after he was charged. The 2nd accused also denied any knowledge of the deceased and also stated that he had no idea whether the deceased died.

Submissions

8. At the close of hearing Mr. Fwaya who appeared for the 2 accused persons did not make any submissions. Both Mr. Fwaya and Mr. Oroni who appeared for the State asked the Court to give them a date for judgment.

Issues for Determination

9. For the State to be assured of a conviction in this case, it must prove the following:-
 - a. That the deceased died as a result of the unlawful act or omission on the part of the accused persons and
 - b. That there was malice aforethought on the part of the accused persons in perpetrating their unlawful act or omission.

Analysis and Findings

10. With regard to the first issue there is no doubt that the deceased herein, Alex Vusera died. Both

PW1, Elizabeth Makungu and Jackson Odenyo, PW6 identified the body of the deceased to Dr, Francis Odera who performed the Post Mortem examination on the body of the deceased on 17/12/2008. Dr. John Kaguthi also testified to the fact of death of the deceased as also did PW4 and PW5. In my humble view, the Prosecution has clearly proved that the deceased indeed died.

11. The more troublesome issue is whether the Prosecution has proved that the deceased died as a result of the unlawful act or omission on the part of both or one of the accused persons. Apart from PW3, Jane Muhonja Orago, there is no other witness whose evidence tended to connect the accused persons to the alleged offence. Even the evidence by PW3 falls short of establishing a nexus between the deceased's death and the acts or omissions on the part of the accused persons. According to PW3, all she heard were voices saying "I am taking you home". Though she stated that one of the voices she heard saying "I am taking you home was the voice of the 2nd accused person. She did tell the Court anything more about the utterances made to suggest that there was there anything sinister or criminal about those alleged words. In my view, one cannot impute any sinister or criminal element to such words. Further, according to PW3, she only saw the 1st accused person though she allegedly heard the voice of the 2nd accused. In fact even PW4 and PW5, APC Kenneth Ouma and PC Aggrey Munyasia said nothing about the arrest of the 2nd accused person and how he was connected to the alleged offence of murder. In brief, there is absolutely no evidence before me to show that the deceased died as a result of the unlawful act or omission on the part of either one or both accused persons. The State needed to do more in terms of investigations to place such evidence before me. The investigating officer did not testify and as such the Prosecution's case is left hanging on a branch that cannot support it.

12. The third and final issue to be determined by this Court is whether the Prosecution has proved any malice aforethought on the part of one or both accused persons. In my view, that has not been done. First and foremost, I have reached the conclusion that there is no evidence to show that the deceased died as a result of an unlawful act or omission on the part of the accused persons. That conclusion automatically means that there cannot be malice aforethought without proof of the unlawful act or omission. Consequently I find and hold that none of the elements under Section 206 of the Penal Code Cap 63 Laws of Kenya has been proved by the State.

Conclusion

13. Having made the above findings I have reached the conclusion that the Prosecution has not proved the charge of Murder against both accused persons. I therefore make a finding of not guilty under Section 322 (1) of the Criminal Procedure Code. The two accused persons are to be released from prison custody forthwith unless they are otherwise lawfully held.

14. Orders accordingly.

Judgment read and delivered in open Court at Kakamega this 17th day September of 2015.

RUTH N. SITATI

J U D G E

In the presence of:

Mr. Omwenga for State

Mr. Minishi h/b for Mr. Fwaya for 1st and 2nd accused

Mr. Solomon Lagat – Court Assistant