



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL CASE NO.39 OF 2010

REPUBLICPROSECUTOR

VERSUS

PIUS MUKHWANA.....ACCUSED

J U D G M E N T

Introduction

1. The accused herein PIUS MUKHWANA is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on the 26th day of September 2010 at Indete village, Shibeyi sub location, Idakho North location in Kakamega South district within Western province the accused PIUS MUKHWANA unlawfully and intentionally murdered EPHARIM MALLUNGU. When the charges were read to the accused he pleaded not guilty.

Prosecution Case

2. The Prosecution called a total of nine (9) witnesses. PW2 TAFLOZA AMUDAVI from KEVEYE in Shiboye sub location testified that on the 25/9/2010 at about 9.00a.m she found the deceased EPHRAIM MALLINGU in his house. She claimed that he had cut injuries on the neck and face and the body was on the floor near the door. She started screaming and neighbours went to the scene and started making inquiries. The accused PIUS MUKHWANA a cousin to the deceased is the only one who did not go to the scene even though he lived ½ km away from the scene.

3. PW2 told the Court that when they went to check the accused in his house he was found locked inside. The accused told those looking for him that he had been asleep. They arrested him and took him to Kakamega Police station. She testified further that the body of the deceased was taken to the mortuary and later buried and that some blood stained clothes were also recovered in the house of the accused by the Police together with a panga. She claimed that another panga was recovered from the shamba of the accused by PW4 JACINTA. On cross examination by Mr. Abok PW2 maintained that she discovered the body at 9.00p.m on 25.9.2010 but she did not witness the attack on the deceased.

4. PW3 HENRY YUMATSI testified that on the 25.9.2010 he heard screams from Mzee Amdavi's home as he was coming from church. He went there and found that people had already gathered. He saw the deceased EPHRAIM MALUNGU who had been cut on the neck and face. He informed the assistant chief who also went to the scene with Administration Police officers from Shibeye AP Camp. Police officers from Kakamega Police station were also telephoned by the assistant chief and they also went to the scene. The Police officers made inquiries at the scene and asked for the deceased's relatives. He testified that the accused a cousin to the deceased was called from his house. He knew the accused who was a neighbour. They questioned the accused, led him to the scene where the deceased's body was but

the accused denied any knowledge of the deceased's death. He stated that the scene was photographed and the body removed and taken to the mortuary while the accused was taken to the Police station. PW3 stated that he did not know who killed the deceased.

5. On cross examination by Mr. Abok PW3 told the Court that he heard the screams at about 8.00a.m although he was not sure of the date. He maintained that he did not know who killed the deceased. PW4 JACINTA AMBEYI from Shibeye sub location told the Court that on 28/9/2010 she had gone to river Kolokoli to wash clothes when she saw a panga beside the river in the shamba of Pius and it was in a hole filled with water. She was able to identify Pius in the dock who was her brother in law who she had known for over forty (40) years. She telephoned the village elder and informed him of the panga. The Police later came and took away the panga. She told the Court that she knew the panga belonged to the accused as she used to see him with it and that at one time she had borrowed it from him to cut grass. She described it as having a black plastic skin at the handle and saw that it was well used.

6. On cross examination she confirmed that she was the one who discovered the panga by the river but the panga was not in Court. She also stated that she did not know who left the panga in that hole. PW5 FORNES MUTSALLIKA from Kapsabet testified that on 26/9/2010 at about 10.30a.m he received information of the death of EPHRAIM MALLINGU from a relative. The deceased was his step brother. He proceeded to Ikolomani the home of his mother where the deceased had died but found the body had been removed on 29/09/2010. He went to Kakamega General Hospital where together with PW2 they identified the body of the deceased to the doctor who conducted the post mortem examination. He did not know who killed his brother.

7. DR. DICKSON MCHANA testified twice as PW1 and PW6. He told the Court of his qualifications and that he was the Provincial Pathologist Western Province. He conducted the post mortem on the body of the deceased EPHRAIM MALLINGU AMBAKI on the 29/10/2011. He found that the body had 4 deep fatal cut wounds which injured both the upper and lower jaws. The body was identified to him by PW2 and PW5. The clothes were torn and blood stained. There was mutilation of the left eye with deep fractures which were deeper on the left side. The neck was nearly cut into two and had fractures on the 5th, 6th, and 7th bones of the neck. The lower chest and the back had 2 deep cut wounds, the stomach and the spleen were peeping out and there was a stab wound on the interior abdomen. The body had defence bruises on the forearm and the right thigh had sporadic bruising on the anterior aspect.

8. On internal examination there was fracture of the 8th, 9th and 10th ribs with laceration of the left lung lower lobe. The vessel on the neck and face had been severed, stomach was perforated and there was injury on the bones. The fracture caused the head to tilt.

9. He opined that the cause of death was deep cut wounds which arose from sharp object caused by assault and that the assault was proved by defence bruises. He filled in a burial permit and stated that all injuries were caused by sharp objects. He also signed the post mortem report which he produced as Prosecution Exhibit No.1. There were no questions for him on cross examination.

10. PW7 WILFRIDA AMUTWAYI SHIYACHI the assistant chief Shiveye sub location Ikolomani division testified that she received a call from PW3 who told her that the deceased had been assaulted and his body was lying at his door. She called the AP's and went to the scene. She also called the OCPD and OCS who also went to the scene. She stated that Pius was the suspect because he was absent at the scene yet he was a neighbour. She explained that they found the accused (Pius) at his home and on enquiring from him why he did not respond to the alarm raised he said he did not hear anything about the incident. She testified further that they found a hoe (shoka) and a trouser from the accused's house. On asking for the panga the accused normally used the accused denied having a panga. She was called again on the 28/09/2010 and told that the accused's panga had been recovered at a river. The panga was taken to the Police. She told the Court that the body was taken to Kakamega Hospital Mortuary after which she recorded her statement at Kakamega police station. She stated that the accused comes from her area.

11. On cross examination she told the Court that she did not witness the incident and further that the panga, shoka and trouser were not in Court. PW8 ELIJAH KANGAYIA told the court that he heard

noise from the deceased's mother who was saying her son had been killed. He went to the scene where he found many people among them the village elder. They called the Assistant chief and people wondered where Pius (accused) was since he was a close neighbour. He told the Court that the village elder arrested Pius from his house. He testified that the Police got an old panga from Pius's home and that he asked Pius where his normal panga was and he said that it was lost. He stated that the people just suspected Pius as he did not come to the scene while people were mourning. He testified that Pius was alone in his house and that after four days the sister in law to the deceased saw a panga belonging to Pius inside a hole near the river which was taken by the Police.

12. On cross examination he testified that he did not witness the killing but found when the deceased had already died. He reiterated that the accused was found in his house and that people were inquiring why he was not at the scene. He also maintained that the Police took the old panga which was not produced in Court. After Hon. Mr. Justice S.J. Chitembwe went on transfer, directions in this case were taken and I proceeded with the case from where Chitembwe J had left it. The directions were taken pursuant to the provisions of Section 200 (3) of the Criminal Procedure Code.

13. PW9 No.38881 PC ELIPHAS GATIMU stationed within Baringo County but previously attached to Kakamega Police Station on Crime Investigation duties told the Court that on the 26/09/2010 he received a report of murder. He was called by the OCS and together with OCPD for Ikolomani South they visited the scene at Mudete village in South Kabras and on arrival found the deceased at his grass thatched house with deep cut wounds on the face, neck and the back. He interviewed the family members including the mother of the deceased who was also the mother of the accused.

14. During the investigation he established that the accused and deceased had been quarrelling for long over family affairs and that on the fateful night deceased came home drunk and quarreled with accused at the formers house. The family thought that the quarrel was one of the usual ones. He re-arrested the accused on arrival at the scene since members of the public had already arrested him. On interrogating him the accused admitted that they had quarreled but denied the murder.

15. He did a search in the deceased's and accused's houses and recovered an axe and a panga which he suspected to be the murder weapons. The weapons were found in the deceased's house. On the 29/09/2010 a family member called the OCS and they again went with the OCS and the OCPD to the scene and were shown a panga lying some 200 meters away from the home near stagnant water. The panga was given to them and they thereafter recorded statements from witnesses and compiled the file which he forwarded to the State Counsel.

16. He added that at the scene they also recovered a long trouser which appeared to have blood stains or dust. The panga, the trouser and the axe were taken to the Government Chemist for analysis. He produced the panga PExhibit 2 the axe PExhibit 3 and the trouser as PExhibit 4. He also produced the report from the Government Chemist dated 20/09/2011 which was compiled by M.M Mwaura which was marked as PExhibit 5.

17. On cross examination by Mr. Abok he confirmed that he did the investigations together with the O.C.S. and added that the panga and axe were suspected Murder weapons. He testified that the mother to the deceased was present when they recovered the Exhibits. He told the Court that from the Report of Government Chemists, PExhibit 5 both the panga and axe did not have blood stains. He confirmed on cross examination that both the panga and axe were not shown to have been the murder weapons. He was not aware whether any further Investigations were done after the report. He told the Court that he could not tell what weapon was used to commit the offence and that he was not present when the deceased was murdered.

18. The Prosecution closed its case at this juncture and after analyzing the Prosecution case and the submissions by Mr. Ngetich for the State and Mr. Abok for the accused, I found that a prima facie case had been established against the accused person and placed him on his defence.

Defence Case

19. The accused gave sworn evidence and did not call any witness. He told the Court that he was a farmer from Shiveye Ikuhu in Kakamega County. On the 26/09/2010 he was at home and at about 9.00a.m he heard PW1 saying in Kiluhya that her child had died. He testified that on hearing that cry he informed his elder cousin ELIJAH KANGAYA KHAMALA and asked him to go with him to PW1's place. They did so and on arrival at the home of PW1, they found the deceased dead and lying in front of his house. He also informed Samuel Amudavi and the village elder who informed the Assistant chief who came with AP's from Shiveye chiefs camp. Thereafter Ikolomani Police station was informed. He then went back to his house for breakfast. As he took breakfast PW1 began to suspect that the accused killed the deceased on grounds that accused and the deceased had quarreled in the past. He claimed that PW1 then informed PW2 PC Gatimu of Kakamega police station. When the Police came he was given gloves by PC Gatimu with instructions to assist in carrying the body of the deceased to the vehicle but before accomplishing that task, he was ordered to remove the gloves on suspicion that he had killed the deceased. He was then arrested and taken to Kakamega Police station.

19. He was put in the cells for three (3) days and there after informed that a panga which was the suspected murder weapon had been recovered. He was then charged. He explained that his house was about 50 metres from the deceased's house. The Court noted that the witness had kept his eyes away from the Court all the while he testified inspite of being asked to face the Court.

20. The accused was cross examined by Mr. Oroni State Counsel. He explained that before his arrest the Police searched his house and recovered an axe, a long trouser jeans which had no blood stains. He further told the Court that the panga was found after he had been put in the cells. He also testified that the gloves were not produced as exhibits and that he was not forced to carry the deceased's body by P.C Gatimu nor did he carry the body. He confirmed that his home was about 50 metres away from the home of the deceased. He also explained that PW2 was his younger uncle's wife who was a quarrelsome lady, though the family members were used to her quarrels.

22. Re examined by Mr. Abok the accused explained that he was not present when the panga was found but he was present when the axe which he used for splitting firewood was found in his house. He claimed that it is PW2 who framed him. When examined by the Court he explained that his relationship with PW2 was not good as she was always quarrelling.

23. The defence closed its case and Mr. Abok made his final submissions. He submitted that all the Prosecution witnesses especially PW9 informed the Court that the alleged murder weapons were an axe and a panga which according to the evidence were never produced. Further it was submitted that the two exhibits had no blood stains, and that in effect PExhibit 5 exonerated the accused person and also confirmed that the axe recovered from the accused's house was used for splitting firewood. He submitted that the deceased blood group which was of group B did not match with blood found on any alleged murder weapon.

24. Lastly Mr. Abok submitted that none of the Prosecution witnesses witnessed the murder taking place and that the Prosecution's case is based on unproved allegations which do not link accused to the murder. He asked the Court to acquit the accused. Mr. Omwenga in response submitted that the Prosecution entirely relied on the evidence of the witnesses on record.

Analysis of the Evidence

25. From the evidence on record the deceased was killed within his home. The evidence the Prosecution gave was circumstantial as none of the witnesses saw the accused kill the deceased. The accused was also present within the homestead on the day the body of the deceased herein was discovered. He claimed to have informed other members of his family after he heard PW2 screaming and shouting that his son had been murdered. The accused also claimed to have called the village elder who visited the scene and who in turn called the Assistant Chief.

26. The Assistant Chief visited the scene of crime together with Administration Police. Later Police from the Kakamega Police station arrived at the scene and PW9 interrogated the family members present, after

which he came to the conclusion that it was the accused who killed the deceased herein. PW9's testimony is crucial in this case. From the evidence of the Prosecution the accused was linked to the offence herein because of the following reasons:-

- a. He was not seen at the scene of crime when PW2 made a distress call whereas his house is hardly fifty (50) metres from the deceased house.
- b. The accused often quarrelled with the deceased over family issues. This was brought out clearly by the investigating officer PW9 who claimed that from his investigations the accused quarrelled with the deceased that night before the body of the deceased was discovered near his door.
- c. A panga and an axe were found in the accused's house together with a long trousers jeans which was blood stained. And that another panga was found by PW4 hidden at a place near the river.

27. The defence on their part have maintained that the accused did not commit the offence herein for the following reasons:-

- a. The alleged murder weapons were not produced as exhibits.
- b. The two alleged murder weapons had no blood stains and PExhibit 5 exonerated the accused.
- c. No one witnessed or saw the accused killing the deceased herein.

The Law

28. Section 203 of the Penal Code defines murder in the following terms. **“Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.”** Thus the central ingredients of the offence of murder are:

- a. Malice aforethought.
- b. An unlawful act or omission on the part of the accused which results in the death of the deceased.

29. Malice aforethought has also been defined by Section 206 of the Penal Code in the following terms:

“206. 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 omission 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 bodily 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.**

30. PW1 who also testified again as PW6 noted the injuries suffered by the deceased person and opined that the cause of death was a result of deep cut wounds secondary to sharp object following assault (see PExhibit 1). Thus the death of the deceased was confirmed by PW1 who also confirmed the cause of that death.

Issues for Determination

31. The questions for determination therefore are:

- a. **Whether the death of the deceased was as a result of an unlawful act or omission on the part of the accused.**
- b. **Whether such an unlawful act or omission was committed with malice aforethought.**

32. On the first issue herein no one saw the deceased being attacked by the accused. The evidence is wholly circumstantial and hinged on suspicion premised on allegations that the accused herein was not seen at the scene of crime when PW2 made a distress call even though he lives just 50 metres from the deceased house. PW2 in her testimony claimed that the accused was brought out of his house by neighbours. PW3 was attracted to PW2's house by screams he heard while coming from church. PW3 stated that the accused was called from his house where he had locked himself. PW7 the Assistant Chief testified to the fact that they suspected the accused because he was absent from the scene. PW9 the Investigating Officer testified that during investigations he interviewed the deceased's family members who included PW2 and found out that on that night 25/09/2010 there was a quarrel between the accused and the deceased. He also testified that since the accused and deceased had been quarrelling for a long time the family ignored the commotion that was outside. However, no particular witness said he/she heard the commotion, though it was claimed it was a habit that the family had got used to for a long time for the accused to quarrel with the deceased. PW9 re-arrested the accused since accused had been arrested by members of the public.

33. The critical question that arises for determination at this point is whether the evidence on record has proved that there was malice aforethought on the part of the accused and further whether the accused is guilty of any unlawful act or omission which resulted in the death of the deceased. In my considered view the answer to both questions is in the negative. The evidence shows that the only reason why the accused was connected with the murder of the deceased was the accused's failure to join other family members when the cry of death rent the air from PW2. So, does suspicion amount to guilt on the part of the accused person? Or can it be said that there was an unbroken chain of circumstantial evidence linking the accused person to the murder of the deceased?

34. In the case of **Wahili & another –vs- Uganda [1968] E.A 278**, the decomposed body of the deceased had been found buried fully clothed, enclosed in a sack, with a strip of elastic wound tightly around the neck and the hands tied tightly around the neck and the hands held behind the back. The medical evidence about the death was unsatisfactory and did not exclude the possibility of death from natural causes. The trial court was satisfied that the circumstantial evidence proved beyond reasonable doubt that the deceased had been unlawfully killed by strangulation by means of the elastic material. On appeal to the Court of Appeal Spry JA (as he then was) stated the following:-

“Mr. Kakooza’s first submission was that the learned judge had not given sufficient weight to the medical evidence and he argued that the appellants should not have been convicted in the absence of medical evidence as to the cause of death. It may be added that, for the same reason, Mr. Deobhakta, who appeared for the Republic, was not disposed to support the conviction. Of course, such evidence is always desirable and usually essential, but there are exceptions. There have, for example, been several cases in East Africa where persons have been convicted of murder, although the body of the victim was never found and the case against the appellant depended entirely on circumstantial evidence. There may be other cases where medical evidence is lacking but where there is direct evidence of an assault so violent that it could not but have caused immediate death. On the other hand, where there is medical evidence and it does not exclude the possibility of death from natural causes, the task of the prosecution is very much harder and only in exceptional circumstances could a conviction for murder be sustained. We think this is such an exceptional case. The condition in which the body was found buried, with the elastic tightly round the neck and the hands tied behind the back taken with the other evidence in the case, points irresistibly to an unlawful killing. We think any other supposition would be quite unreal. Mr. Kakooza suggested that this might have been an extraordinary tribal method of burial but there is no evidence whatsoever to support this hypothesis and it should not have been difficult to produce such evidence if there were any substance in the theory. Moreover, it was not put forward by either appellant. We reject this ground of appeal. We cannot but feel that the post mortem examination was performed somewhat perfunctorily.”

35. Clearly, the law is that in order to justify a conviction based on circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation

upon any other reasonable hypothesis than that of his guilt and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence rests squarely at the feet and on the shoulders of the Prosecution and never shifts to the accused.

36. Applying the above principles to this case, I do not find any unbroken chain of evidence that links the accused person to the murder of the deceased. For example none of the witnesses came out in his/her evidence to say that he/she saw the accused and the deceased quarrelling on the night before the badly mutilated body of the deceased was found lying at the door to his house. Nor did any of the witnesses claim that the accused was the last person to be seen in the company of the deceased on that dreadful night. Although it is clear from the evidence of Dr. Mchana that the deceased died from the ghastly bodily injuries on the head, face stomach and legs, it is not shown that it is the accused who inflicted those injuries, whether alone or with others.

37. The only thread on which the Prosecution case is fixed is suspicion, but the law is clear that suspicion, no matter how strong cannot form the basis of a conviction for any offence. This legal position was stated by the Court of Appeal in the case of **Sawe –vs- Republic [2003] KLR 364** at holding number 7 to the effect that “suspicion, however strong cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”

Conclusion

38. From the foregoing analysis, I do find that there is no evidence on record to prove the charge of murder against the accused person. It may be true as alleged by the Prosecution witnesses, that the fact that the accused did not respond when PW2 cried saying her son had been killed, that the accused had a hand in the deceased’s death but that suspicion alone does not amount to cogent evidence clearly connecting the accused to the murder of the deceased.

39. In the premises, I find and hold that the accused person herein PIUS MUKHWANA LIDEMBEKHO is not guilty of the murder of EPHRAIM MALUNGU AMDAKI and hereby acquit him of the charge under Section 322 (1) of the Criminal procedure Code, Cap 75 laws of Kenya.

40. Unless he is otherwise lawfully held, the accused person shall be released from prison custody forthwith.

41. Orders accordingly.

Judgment delivered, dated and signed in open Court this 30th day of November 2015.

RUTH N. SITATI

J U D G E

In the presence of:

Mr. Omwenga (present) for State

Mr. Osango for Abok (present) for Accused

Mr. Lagat - Court Assistant