



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO.6 OF 2010

LESIIT, J

REPUBLIC.....PROSECUTOR

V E R S U S

PETER KAIRUTHA1ST ACCUSED

STANLEY MURUGU2ND ACCUSED

JUDGMENT

1. The Accused persons Peter Kairutha, 1stAccused and Stanley Murugu 2nd accused are facing a count of murder contrary to section 203 of the Penal Code as read with section 204 of the Penal Code. The particulars of the offence are that on the on the 31st day of December 2008 at Kirititi village Mbeu Location, Igembe District within Eastern Province jointly murdered Francis Kanyithia.

2. The prosecution called 7 witnesses. The facts of the prosecution case were that on the morning of 1st January, 2009 the body of the deceased was found lying on the road while dead while PW5 a boy of 16 years reported that matter to PW1 who was the brother of the deceased. According to PW4 who is a sister of the deceased she was sleeping in her house when at some point in the night she heard the deceased quarrelling along the road he then heard him calling the name Karingu. PW4 identified a woman who was seated in the court as the said Karingu. PW4 testified that she continued sleeping when she heard one Zipporah, one Jacinta PW3 and the 2nd accused in the case chasing the deceased in their compound. The 2nd accused compound where they were was shown to be 200 meters from PW4's home. After some time she heard somebody say "*Peter have you got him?*" PW4 stated that after that she heard the deceased calling out the name of her husband 3 times. She said that her husband was not at home at that time and that she did not go out of the house because she had young children and that she was afraid because she was alone. The following day she heard of the death of the deceased.

3. According toPW6, the doctor who performed the postmortem examination on the body of the deceased formed the opinion that the cause of death was head injury caused by a blunt object.

4. The 1st Accused person in his defence said that he did not know how the deceased met his death. He then stated that he was arrested on the morning of 1st January 2009 and held for 14 days after which he

and the 2nd accused were charged with this offence. He said that PW2 and 3 were his aunt and cousin respectively.

5. The 2nd accused in his defence said that he did not know how the deceased died. He said that he was arrested on 1st January and that is the time he knew of the death of deceased. He said that he was arrested and held for 14 days after which he was charged with this offence. He said he had been held together with the co-accused, PW2 and 3 his mother and sister respectively, and two others. The rest were released.

6. The accused are facing a charge of murder contrary to section 203 of the Penal Code. The prosecution has the burden to prove the charge against the accused person on the requisite standard of proof beyond any reasonable doubt. The prosecution must adduce evidence to show that the accused persons inflicted the fatal injuries on the deceased, and that those injuries were the cause of death. The prosecution must show that at the time the two accused inflicted the injuries, they were motivated by malice aforethought and had formed the intention to cause grievous harm or death to the deceased. Since the accused are charged jointly, the prosecution must also prove that the two accused had formed a common intention to cause death or grievous harm to the deceased.

7. Section 206 of the Penal Code defines malice aforethought, an important ingredient to the charge of murder 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) ...

(d) ...”

8. The case of Nzuki V Rep 1993 KLR 171. the learned judges of Appeal set out the principles of determining whether intention to commit murder is proved as follows:

“ 1. Malice aforethought is a term of art and is either an express intention to kill or implied where by a voluntary act by a person intending to cause grievous bodily harm to his victim and the victim died as the result.

2. Before an act can be murder, it must be aimed at someone and must be an act committed with one of the following intentions

a. To cause death;

b. Cause grievous bodily harm; and

c. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensure from his acts, and commits these acts deliberately.

3. Without an intention of one of these three types, the mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into the crime of murder.

4. ...

5. The offence with which the appellant was charged and convicted was committed in an environment of beer drinking and dancing, and except for the appellants bare statement in his unsworn testimony, there was absolutely nothing on the record of the superior court from which it could be implied that the appellant had any of the intentions when the unlawfully assaulted the deceased."

9. The accused are charged of committing the offence jointly with each other. Common intention is defined in the Penal Code under section 21 as follows:

21. When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

10. I have carefully considered the evidence adduced in this case both by the prosecution and the defence. I have also considered the submissions by Mr. Mutuma for the accused persons, and of Mr. Mungai Prosecution Counsel for the State. Mr. Mutuma's submission were that PW4 did not hear the deceased being beaten. He also submitted that those PW4 heard chasing the deceased was not charged. He also urged that the alleged blood stained clothes taken from the house of each of the accused produced negative results. Mr. Mungai on his part submitted that the prosecution had proved its case against the accused to the required standard.

11. The evidence adduced in support of the prosecution was not direct. It is not circumstantial either. The evidence of PW2 and 3 was that the Police locked them up for 7 days to force them to make statements implicating the two accused in this case. PW2 and 3 are related to the accused. PW2 is mother of PW3 and 2nd accused and aunt to the 1st accused. PW3 is sister to the 2nd accused and cousin of 1st accused. Both said they knew nothing about the deceased death.

12. PW7, the investigating officer of this case said that all the statements he recorded from witnesses including PW2 and 3 were made voluntarily. He denied locking up any witness (es) before recording their evidence. PW7 testified that PW2 and 3 in their statements stated that they witnessed the accused persons assaulting the deceased the night before he was found dead.

13. The evidence of PW2 was different from what she told PW7 at the time she recorded her evidence. The Prosecution Counsel treated PW2 as a hostile witness. The prosecution refrained from treating PW3 as hostile witness. Even though he did not treat her as such, PW3 was as much a hostile witness as was PW2. In the Court of Appeal case of **NDUNGU KIMANYI –V- REPUBLIC [1979] KLR 283**, MADAN, MILLER and POTTER JJA held:

"The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence."

14. I am guided by the above case. Where the integrity of a witness is in doubt their evidence is unsafe and cannot be relied upon. Consequently the credibility of PW2 and 3 is in doubt and naturally their evidence is of no probative value. Their evidence was therefore worthless.

15. The only other evidence was that of PW4, a sister of the deceased. Her evidence is that she was

sleeping in her house on the night of the incident. She was not able to tell the time because she never left her bed. Her evidence was that her home where she was that night was 200 meters from the home of PW2, 3 and the 2nd accused. She said she first heard the deceased quarreling along the road and calling out the name of one Karingo. PW4 identified a woman who was in court as the Karingo whose name the deceased was calling out. PW4 testified that she then heard the deceased being chased by PW2, 3, the 2nd accused and one Zipporah. She then heard a person ask 'Have you caught him?' PW4 stated that she then heard the deceased call her husband three times but that her husband was not at home. PW4 said that she did not go out to the deceased as she was alone.

16. The prosecution has the burden of proof. The burden is to prove that the accused persons inflicted the injuries that led to the deceased death. The evidence of PW4 does not claim that anyone, leave alone the accused in court, inflicted any injury on the deceased. Her evidence was she was inside her house sleeping. It was at night. She did not claim she saw anything, she only heard things.

17. The things PW4 heard were quarrelling by the deceased, then people chasing the deceased. Since feet have no voice the evidence of PW4 that the deceased was being chased, and an attempt to name those chasing him is speculative and deduction out of conjecture. Deductions and conjecture are speculations. In fact the conclusions PW4 made of what she heard on the night in question did not include the matters relevant to this case.

18. The issue is who murdered the deceased? The evidence of PW4 does not answer that question, or even attempt to answer same. Her evidence falls short of establishing the cause of deceased death. I find PW4's evidence was unsafe and inconclusive and immaterial to the serious issues of how the deceased met his death. Her evidence serves only one purpose, to show that the deceased was at some time in the night before his body was found in the neighborhood of PW4's home, and that he was in a quarrelling mood. Among those with the deceased that night were Karingo and Peter. Being single names, the prosecution needed to find out who these two people were, and to interview them in order to get to the truth. The others PW4 named like PW2, 3, 2nd accused and Zipporah were conclusions PW4 made from conjecture.

19. The other evidence PW7 gathered was blood stained clothes from the 1st and 2nd accused. These clothes were taken to the Government Analyst and the results came back negative. The clothing of the accused recovered at their home on the day deceased was found dead was of no probative value to the prosecution case.

20. The accused have denied being present where deceased met his death. They also maintain that they did not know how the deceased met his death. The accused persons bear no burden to establish how deceased died or how the deceased met his death.

21. Having considered the evidence adduced by the both sides, I have come to the conclusion that the prosecution has failed to prove its case against the accused persons on the required standard of proof beyond any reasonable doubt. Consequently I give the accused persons the benefit of doubt and acquit them for this offence under section 322(1) of the Criminal Procedure Code.

DATED, SIGNED AND DELIVERED AT MERU THIS 26TH DAY OF JUNE, 2014.

LESIIT, J.

JUDGE