



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

HCR NO. 12 OF 2010

LESIIT, J

REPUBLIC.....PROSECUTOR

V E R S U S

ANDREW KIRIMI.....ACCUSED

JUDGMENT

1. The accused 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 2nd day of August, 2008 at Kindani Location in Igembe South District within the Eastern Province murdered TITUS NKUBITU.
2. The prosecution called a total of 5 witnesses. The facts of the prosecution case were that the deceased person was the husband of PW3 Katarina, and that on the 2nd August 2008; he left his wife at home at 7 am to go and buy bags for harvesting maize. PW3 expected the deceased to return that morning with the bags so that they could harvest the maize but by 5 pm he had not returned. At around 5 pm, one M'Ruguru went to her and informed her that the deceased was lying injured with several cuts near Kithaka's canteen. Katarina rushed to the canteen and found her husband lying on the ground with deep cut on the cheek exposing the teeth and another on the neck. PW3 testified that the deceased told her that it was Andrew who injured him and he then asked her for water. She said that when the deceased tried to drink the water it came out from the neck and cheek where he had the deep cuts.
3. It was PW3's evidence that while at the scene holding her husband the accused person went to her and informed her that since his life was coming to an end he wanted to kill ten people that day. PW3 testified that the accused started chasing her with a slasher. PW3 stated that the accused person only left her when M'Ruguru appeared in the scene. The deceased died shortly thereafter as M'Ruguru and one Mbaabu carried him on a stretcher intending to take him to the police. The two men abandoned the deceased 100meters from the scene of the murder. He was collected the next day by PW1, the investigating officer of this case.
4. The accused in his own defence put forward an alibi as his defence and stated that on the 6th August 2008, he left his house very early in the morning at about 6 am in order to go to his shamba at Kabugu to guard his orange trees from monkeys. He stated that he spent the whole day in the shamba and only returned after 6 pm. He said that he was arrested two years later on the 23rd January 2010 while receiving treatment for an assault in Maua Methodist Hospital.
5. The accused person is facing a charge of murder contrary to section 203 of the Penal Code. The burden lies with the prosecution to adduce evidence to establish that the accused person cut the deceased inflicting serious injuries as a result of which the deceased died, and that at the time he cut the deceased he had formed the necessary malice aforethought to cause death or grievous

harm. Section 203 of the Penal Code which creates the offence of murder stipulates as follows:

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

Malice aforethought is a necessary ingredient in the offence of murder. The circumstances which constitute malice aforethought are set out under section 206 of the penal Code as follows:

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances –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; 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;

(d)...

(e) ...”

6. The issues which arise from this case are four. The first one is that there was no direct evidence that the accused person was the one who cut the deceased inflicting the serious injuries which led to the death of the deceased. The prosecution is relying on circumstantial evidence. I will get back to this later.
7. From the doctors finding at post mortem as per Prosecution exhibit 1 produced by Dr. Grace Nguyo on behalf of Dr. Macharia, the deceased had deep cuts on the left cheek involving blood vessels, muscles and the jaw bone. He also had a deep cut on the scalp with compound fractures on the left parietal bone and occipital, with damaged left artery to the brain. He also had deep cuts on the right thigh and left leg. The cause of death was found to be head injury. Despite clear proof that the deceased had been severely injured, there was no direct evidence that the accused person is the one who inflicted the fatal injuries on the deceased.
8. The other issue is about the failure to call witnesses. The wife of the deceased Katarina testified that she had been called from home by one M'Ruguru who told her that her husband had been cut and was lying near the kiosk owned by Christine Munania. The prosecution did not call M'Ruguru or Christine Munania. In fact no statements were taken from these two people. It is however clear that they were vital witnesses as they had vital information, especially M'Ruguru regarding the death of the deceased. The prosecution ought to have called them as witnesses.
9. Failure by the prosecution to call these two witnesses can lead to the drawing of an inference against the prosecution to the effect that had they been called as witnesses, their statement or evidence would have tended to be adverse to the prosecution case. This was the position that was taken by the court in the celebrated case of **BUKENYA & OTHERS 1972 EA 549 LUTTA Ag. VICE PRESIDENT** held:

“The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.”

10. I find this a fitting case to draw an adverse inference against the prosecution which I do. The evidence not called was material since the two people appear to have witnessed the attack. They should have been able to say who the attacker was. Failure to call them can only be explained on the basis that their testimony would not have been favourable to the prosecution.
11. The other issue is that those who were called as witnesses did not witness the incident. The evidence by PW2 and 3 dwelt on the events which followed after the deceased had been

wounded. In fact what PW2 said was what was reported to him by the deceased wife, PW3. PW2 was called by PW3 to see the assault that had been visited upon the deceased. He visited that scene to confirm the deceased had been injured. He then prepared a makeshift stretcher with the help of M'Ruguru. They used it to carry the deceased for only 100 meters but abandoned him when they realized he had died. The evidence of PW2 was of no assistance to the prosecution case.

12. The other issue is the fact the prosecution is relying on circumstantial evidence. PW3 testified that as she was trying to give the deceased some water the accused person came with a slasher and tried to cut her claiming that he needed to kill ten people that day. The issue is whether that evidence is sufficient to implicate the accused person with the murder of the deceased. It is circumstantial evidence and the way to test it has been set out in several Court of Appeal decisions. In one such case, **ABANGA alias ONYANGO V. REP CR. A NO.32** of 1990(UR) at page 5 the learned Judges of the Court of Appeal stated the principles which should be applied in order to test circumstantial evidence. They set them out thus:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

13. The prosecution was relying on the fact that the accused person threatened to kill 10 people on the material day. Was the evidence of threats to kill sufficient to establish the case against the accused? The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, and should be of a definite tendency unerringly pointing towards guilt of the accused. The fact the accused threatened to cause injury to the wife of the deceased is not enough to implicate him with the injury that had been caused to the deceased. It was necessary for the prosecution to adduce evidence to either show a nexus between the attack on the deceased and the attempt to injure PW3. Alternatively the prosecution should adduce evidence to show a motive for the attack. The threat seems to have been bare without any motive. It can only be considered in isolation to the attack of the deceased. The prosecution cannot rely on the threats against PW3 to connect the accused to the offence as that is remote and farfetched. No nexus between the threat against PW3 and the injury on the deceased was demonstrated. The prosecution failed to show a nexus or a motive for this attack and therefore the alleged threats do not support the prosecution case in any way.

14. That leads me to the next point. This case was not investigated until two years after the event. It is clear from the evidence of the Investigating Officer that the case was assigned to him two years after the deceased death and only after the accused had been spotted at Maua Hospital where he was undergoing treatment for an unrelated incident. There was no explanation for the delay in investigating the case or in arresting the accused.

15. The accused put forward an alibi as his defence. He said that he spent the day on the date in question in his farm working until evening. He then said that he remained in that area and was only arrested two years later. The accused alibi defence has not been controverted. That defence has shaken the prosecution against the accused and has created a doubt in the court's mind whether the accused was really involved in the case or if indeed he caused an injury to the deceased as alleged.

16. After considering the evidence adduced in this case, I find that the prosecution did not prove the charge against the accused to the required standard. Accordingly, I give him the benefit of doubt and acquit him for the offence accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 17TH DAY OF OCTOBER, 2013.

LESIIT, J.

JUDGE