



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL CASE NO. 52 OF 2008

LESIIT, J

REPUBLIC.....PROSECUTOR

V E R S U S

ALI KABUNGU.....1ST ACCUSED

DANSA DIBA SALESA.....2ND ACUSED.

JUDGMENT

1. The accused persons are 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 8TH day of August, 2008 at Majengo Village in Marsabit District within Eastern Province, jointly murdered Dabo Zainabu Kabuge.
2. The prosecution called a total of 4 witnesses. The key witness was PW1 who was a child of 12 years at the time she testified. She was 7 years at the time the offence was committed. According to her testimony she used to live with her maternal grandmother who is the deceased in this case. She stated that the 1st accused who is the brother of her mother attacked her grandmother in two incidents on two separate days. She said that on the first day the 1st accused held the deceased by the neck “ngeta” until she fainted and that PW1’s parents who were PW2 and 3 in the case intervened and separated the two. on the 2nd incident she said that she was again with her grandmother and the 1st accused went home and he touched her grandmother and did not specify where her grandmother was touched. She said that she screamed as a result of which the 1st accused her uncle ran away. She then called neighbours who on seeing the deceased was bleeding from the mouth ran away without assisting her. Eventually her parents came home and took the deceased to hospital.
3. PW2 and 3 in their evidence stated that the 1st accused quarreled with the deceased on 5th August 2008 in the evening. They both stated that they were home where they lived with PW1 and the deceased. They said that when the 1st accused attacked the deceased, both of them separated the two. They said that the deceased fainted after the attack and that they helped her to her bend and that the following day they took her to hospital where she was treated and discharged. During the 2nd incident PW2 said that he was not at home and that all he knew is what PW1 told him. PW3

- stated that she returned home on the 8th August 2008 and that on the way she met the 1st accused who did not utter a word to her. She said that on arriving at home she found the deceased lying on the front side of the house bleeding profusely from the mouth. She said that she called the chief and the neighbours and took the deceased to the hospital where she was admitted for 8 days and that on the 9th day she passed away.
4. The cause of death of the deceased according to the Post Mortem produced by the Investigating Officer PW4 was severe head injury due to possible assault. It was signed by Dr. Muturi MOH Marsabit District Hospital. The medical notes on the treatment of the deceased at the hospital dated 6th August, 2008 were also produced and they show that the deceased had been assaulted by persons known to her on the 5th August 2008, and that she suffered bruising on the neck and the lower limbs. The medical notes for the period the deceased was admitted in hospital were not produced as exhibits.
 5. The accused persons were both placed on their defence. The 1st accused gave a sworn statement he denied attacking the deceased at any time as alleged. He said that on the 5th August 2008 it was PW2 his step sister who quarreled with the deceased who is his mother. The 1st accused stated that the quarrel was over maize which PW2 alleged that the deceased had received but which was meant for PW2. PW2 warned him and also the deceased his mother of dire consequences so that they will know who she is.
 6. The 1st accused stated that the deceased was living in a plot where he the 1st accused also lived with his wife the 2nd accused. He said that PW1 Njeri lived with her mother PW2 in a plot next to theirs. The 1st accused stated that on 8th August he received a call from Rahama who is his sister asking him to go home quickly with a vehicle because she found their mother had fallen on a stone. He said that it was 6 pm and that he rushed home with a taxi where he found his sister Rahama and a village elder Guyo Bara he said that he picked her mother and took her to hospital where she was admitted. She remained in hospital until she died. He said that he was arrested within the hospital on 10th August by a Police Officer initially for handling stolen goods but eventually he was only charged with the instant case.
 7. The 1st accused stated that after taking his mother to hospital on the 8th August, 2008 he found a padlock on his door which denied him access to his house. He reported the matter to the village elder Guyo Bara. The 1st accused stated that PW2 was fighting him because his mother the deceased was the 2nd wife of their father and that his father had shared the plot equally between the two homes and since PW2's mother had more children they fabricated this case against him so that they could grab their side of the plot.
 8. The 2nd accused put forward an alibi as her defence. She said that from the 5th August, 2008 up to 10th August, 2008. She was staying at her cousin's place at a place called Sargante because she was assisting her cousin who had delivered a baby.
 9. I have carefully considered the evidence adduced both by the prosecution and defence. I have also considered the submissions by Ms Nelima who took over the case from Mr. Mosota and those by Mr. Moses Mungai made on behalf of the state.
 10. The main issue in this case is to the effect that the deceased was attacked on two occasions by the 1st accused. The first incident was on the 5th August, 2008. The injuries the deceased suffered during this attack are those noted on the treatment notes produced as exhibit 2 for the prosecution. According to the notes the deceased suffered bruising on the neck and the limbs and was treated and discharged. Regarding this first incident the eye witnesses are PW1, 2, and 3. Their evidence was that the first accused went to their home where they lived with the deceased and picked a quarrel with the deceased. The 1st accused is said to have held the deceased by the neck until she fainted. PW2 and 3 testified that they intervened and separated the 1st accused from the deceased. Considering the injuries that led to the death of the deceased it is very clear that they could not have been caused during the attack on the 5th witnessed by PW1, 2 and 3.
 11. The 2nd incident was the one of the 8th August; this incident was witnessed by PW1 who was 7 years old at the time. As noted in this judgment PW1 said that she saw the 1st accused touching her grandmother the deceased but she did not know where she was touched she then said that she started screaming when the grandmother started bleeding from the mouth. There was no one at

- home at the time except PW1. PW3 came home after the incident and found her mother already injured lying on the ground and bleeding profusely from the mouth. The injuries that the deceased was found to have at Post Mortem was a severe injury of the head. According to the Post Mortem form there was a fracture of the mandible a fracture of the base of the skull. The doctors finding were that the severe injury of the head was possibly caused by assault.
12. PW1 was the sole eye witness of the attack of the deceased on the eve of August 2008. Her evidence was to the effect that the 1st accused touched the deceased but she was not specific as to exactly where the deceased was touched. The description of the alleged attack on the deceased or the 1st accused in their account of the evidence of PW1 could not have caused the severe head injury from which the deceased died.
 13. The prosecution needed to adduce sufficient evidence to prove beyond any reasonable doubt that the accused persons assaulted the deceased causing her the severe head injury which led to her death. No evidence was adduced to establish that the deceased was attacked severely by the 1st accused in the manner described by the doctor in the Post Mortem Report.
 14. There are other issues that are pertinent, the fact that the eye witness was 7 years old at the time of attack. Her evidence needed corroboration of material particulars implicating the accused persons with the offence. There was no corroboration of her evidence. In addition to that the information she gave to her father PW2 and Mother PW3 in regard to the attack on the 8th August 2008 was not consistent. To PW2, PW1 told him that both accused persons attacked the deceased. To PW3, PW1 told her that the 1st accused attacked the deceased after his wife the 2nd accused made a report to him against the deceased. These inconsistencies create a doubt as to the reliability of the evidence of PW1 and this can be explained for the reason that she was only 7 when the incident occurred and the possibility to confuse issues could not be ruled out.
 15. There are also other issues that remain unresolved at the close of the prosecution and defence case. Both PW3 and the 1st accused claim that their step siblings yet each of them claimed that the deceased was their mother and they lived with her. It is impossible to resolve the conflict in the evidence. First of all the issue as to whose mother the deceased was and the issue as to who between PW3 and the 1st accused lived with the deceased. That matter is complicated further because PW1's evidence was that she lived alone with the deceased. While PW2 and 3 claimed that the two of them lived with PW1 and the deceased.
 16. There was a need for some independent evidence from witnesses who ought to have been called by the prosecution but who were not called. The neighbours who PW1 and 3 alleged came to the scene after the deceased was attacked. Further the chief that PW3 called to the scene on 8th August 2008. These were important witnesses who could have rendered credence to the evidence of the prosecution. Failure to call them can only lead to one conclusion that the prosecution failed to call them because their evidence would have tended to be adverse to the prosecution case.
 17. I have come to the conclusion that the prosecution failed to prove the charge against the accused person to the required standard of prove beyond reasonable doubt. Consequently I give the accused persons the benefit of doubt and acquit them from this offence.

DATED, SIGNED AND DELIVERED AT MERU THIS 13TH DAY OF NOVEMBER, 2013.

J. LESIIT

JUDGE