



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL CASE NO. 37 OF 2006

REPUBLIC

VERSUS

JACKTONE ANZAYA alias SAMSON ANZAYA MANYASAACCUSED

JUDGMENT

1. The accused herein, **JACKTONE ANZIYA alias SAMSON ANZIYA** was charged with the offence of murder contrary to S.203 and 204 of the Penal Code. It was alleged that on the 27th day of December, 2005 at Emunyiri village, Muyundi Sub-location, Marenyo Location, Butere-Mumias District within Western Province, he murdered **JOSEPH NANDWA NAMAI**. He denied the charge and the evidence on record is as follows;

2. According to **PW1, BONIFACE MALOBA NANDWA**, on the material date at about 5 p.m., the accused person viciously attacked the deceased outside his home and occasioned him serious injuries. It was his evidence that the cause of the attack was the following;

That two ladies, Ruth Atai and Joyce Mukala had attempted to use a path that crossed the deceased's home and when the deceased tried to point them to a new path that had been created at the edge of his shamba, the accused person intervened and asked him why he was doing that. The two exchanged some words upon which the accused person lifted the deceased by his legs and fell him on the ground before attacking him with a stick. That PW1, who was standing at a distance, fled to his house and only came out a while later to find his father lying on the ground and talking feebly.

3. PW1 then dragged his father to his house and noted that although he was not bleeding, his limbs were limp and not functioning. The following day, he made a report to the Assistant Chief and the deceased was taken to Butere District Hospital and a report was made at Butere Police Station. In the meantime, the deceased was referred to Kakamega Provincial General Hospital where he died on 2.1.2006.

4. **PW2, SPETA LUKALALA** gave incomplete and worthless evidence because from the record, she was stepped down on 20.2.2007 and she was never recalled. **PW3, RUTH NJEREKHA** on the other hand denied her alleged statement to the police and denied seeing the deceased being assaulted by the accused but admitted that on the material date at 6.30 p.m, the deceased had stopped her and Joyce Mukana from using a path through his home. That the accused then stepped in and asked the deceased why he was chasing the women away. That the women then chose another path and walked away and the next day PW3 heard that the deceased had been injured. She did not know who had injured him.

5. **PW4, JOYCE MUKANA** gave similar evidence to that of PW3 and both witnesses stated that they saw the deceased holding a torch while the accused was holding no item or weapon. She added that after the incident, she next saw the deceased at Butere Hospital but she did not know what he was ailing from although he could talk. She denied seeing PW1 at the scene on the material evening.
6. **PW5, HABIL AURA MUKAMA**, the Assistant Chief, Muyundi Sub-location recalled that he received information of the deceased's alleged assault on 28.12.2005 at 7 a.m. and PW1 informed him that the accused was the one who had injured the deceased. Later, after the deceased had been taken to hospital, he assisted the police in arresting the accused who was then charged with assault and later with murder.
7. **PW6, PASTOR JORAM NAMAI**, a brother of the deceased recalled that he received information on 30.1.2005 that the deceased had been assaulted and so he proceeded to Butere District Hospital the same day but by then the deceased had been transferred to Kakamega Provincial General Hospital. He followed the deceased there but not before passing through Butere Police Station where he was informed that the incident was under investigation.
8. At the hospital, he stated that he found that the deceased was able to talk and for half an hour, he narrated to PW5 what had happened. He allegedly said that on the material date at about 5.30 p.m., he had stopped two ladies from walking on a path through his home. The two were PW3 and PW4 and he had no altercation with them but the accused intervened and after exchanging words, he attacked the deceased with a stick.
9. That on 9.1.2006, the deceased went into a coma and PW5 informed the police who arrested the accused person and charged him with assault on 12.1.2006. The deceased died a few days later and PW5 as well as PW1 identified his body to the doctor who performed the post-mortem on 17.1.2006. During cross-examination, PW5 stated *inter~alia* as follows;
- “in my statement [to the police], I did not give details of what exactly the deceased told me about the incident.”***
10. **PW7, CPL. RICHARD LANGAT**, investigated the case and reached the conclusion that the accused person should be charged with murder and so he was.
11. It was his further evidence that he visited the deceased on 28.12.2005 while he was hospitalized at Butere District Hospital but the deceased was not able to talk and his condition kept worsening and **“he was not able to talk to anybody”**. He denied visiting the deceased at Kakamega Provincial General Hospital and was not sure whether PW6 was able to talk to the deceased at that hospital.
12. **PW8, PC COSMAS WANGILA** attended the post-mortem on the deceased's body which was conducted by PW9, Dr. Jason Amukonyi on 17.1.2006. The deceased had multiple bruises on the neck and also had a fracture at the base of the skull and which ultimately caused his death.
13. When the accused person was put on his defence, he stated that he was the village elder, Muniyiri village and he denied the charge of murder. He pointed fingers at PW1, a relative of the deceased, for framing him up because of a land dispute with the deceased's family. He also took issue with the evidence of PW2 and PW3 and said that PW3 was a chang'aa dealer and he had taken action against her and her evidence was therefore fabricated because she had a grudge against her.
14. I have taken into account the evidence on record as well as the submissions by Mr. Aburili and Mr. Orinda, acting for the accused and State respectively, and to my mind the following issues are uncontested;
15. Firstly, from the evidence of PW1, PW3 and PW4, sometime in the evening of 27.12.2005, the deceased tried to stop PW3 and PW4 from using a path through his homestead. The accused, who was the village elder or “Liguru” had prior to that date created another path and that is the path he wanted the two

ladies to use.

16. Secondly, neither PW3 nor PW4 were able to conclusively state what happened when the deceased confronted them but their evidence as well as that of PW1 was that the accused person was at the scene and attempted to intervene on their behalf.

17. Thirdly, there is no doubt that the deceased was assaulted and fractured his skull, and those injuries caused his death, a fortnight or so later. The evidence of PW1, PW7, PW8 and PW9 cannot be contested in that regard.

18. The contested question is whether the evidence of PW1, the investigations by PW7 and the dying declaration narrated by PW6 should lead to the conclusion that the accused person was the one who assaulted the deceased. A corollary to that question is whether in fact the deceased was able to talk at all subsequent to his hospitalization.

19. I have carefully read the evidence of PW1 and I have no reason to doubt that it was true and honest. The assault took place in broad daylight and the accused person was a village elder and well known to the witness. PW3 and PW4 by their evidence were able to place the accused at the scene and they fled when the deceased and accused exchanged words. PW1 remained nearby and also fled when the accused started beating the deceased. He returned to find his father badly injured and no person other the accused could have inflicted the injuries that the deceased later succumbed to and that was also the reason why the accused was initially arrested and charged with the offence of assault.

20. Tied with the above evidence was that of PW6 who said that he spoke to the deceased at Kakamega Provincial General Hospital and the deceased declared in graphic detail how he came to be assaulted. A dying declaration is only good if it meets the criteria explained in *Choge vs R [1985] KLR I*. In that case it was held as follows;

“The general principle on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at the point of death and the mind is induced by the most powerful considerations to tell the truth. In Kenya, however, the admissibility of a dying declaration does not depend upon the declarant being, at the time of making it, in a hopeless expectation of imminent death.”

21. Applying the holding to this case, there is no evidence whatsoever that the deceased never spoke to the witness because PW7 only saw the deceased at Butere District Hospital and not at Kakamega Provincial General Hospital where he had gone for specialized treatment. In any event, I believe that evidence and taken together with that of PW1 as well as that of PW3 and PW4, it was the accused person and no other person who assaulted the deceased.

22. Did he have malice aforethought? S.206 of the Penal Code provides as follows;

“S. 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.

23. Clearly, when the accused person, with no provocation whatsoever intervened in a very simple matter, his action of whipping and cracking the deceased's skull was malicious and the offence of murder was proved.

24. In the end, the accused is hereby convicted of the offence of murder under **S.203** as read with **S.204** of the Penal Code.

25. Orders accordingly.

Delivered, dated and signed at Kakamega this 4th day of October, 2010.

ISAAC LENAOLA

J U D G E