



**Republic v Tuisang & 3 others (Criminal Case 22 of 2019)
[2024] KEHC 4495 (KLR) (2 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 4495 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CRIMINAL CASE 22 OF 2019**

RB NGETICH, J

MAY 2, 2024

BETWEEN

REPUBLIC PROSECUTION

AND

SIMON KIPRUTO TUISANG ALIAS DAVY 1ST ACCUSED

ELIJAH LESOPIAN KAMALAL 2ND ACCUSED

NICKSON LELEBO 3RD ACCUSED

ALEX CHUNGCHUNG KAMALA 4TH ACCUSED

JUDGMENT

1. The accused persons have been jointly charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code cap 63 Laws of Kenya. The particulars of the charge are that on the 22nd day of September, 2019 at Ng’oswe village in Baringo South Sub- County the accused persons jointly murdered Khamis Salim Abdallah.
2. The accused persons pleaded not guilty to the charge and the matter was set down for full trial with the prosecution availed 10 witnesses. The accused gave sworn evidence and availed 3 witnesses.

Prosecution Evidence

3. PW1 Nickson Leyan Lekachuma testified that on 12th September, 2019, he was in a joint at Ngoswet with Davy who is Accused1 herein and Hamisi who is the deceased herein called a girl who was selling drinks telling her “Babe come here”. He said the girl had a conversation with her and Accused1 who was also interested in the girl got annoyed and started quarrelling with the deceased. That after the quarrel had subsided, his colleagues Accused 2, Accused 3 and Accused 4 entered and asked for drinks one by one while talking.



4. He said the owner of the home Mary arrived and entered the house and said drinks were finished which made the deceased who was so drunk complain to her alleging that she was denying them drinks.
5. He stated that Accused 1 took part of the bed and started a fight with the deceased. That the deceased struggled but the timber from part of bed had a nail which pricked his head while Accused 1 continued beating him.
6. He testified that Accused 2, Accused 3 and Accused 4 never witnessed the fight as they sat a bit far and left after having the drink. He stated that at the time the fight started, Accused 2, Accused 3 and Accused 4 had left. He said that when he realized deceased was overwhelmed, he helped because everybody else had left. He identified the timber used to beat/injure deceased in court. He stated that Accused 1 run after realising he had injured the deceased. He said the deceased had won jeans and a shirt.
7. Pw2 Mary Cheptoo testified that on 22nd September, 2019 she was in her house with her children when at around at around 8 P.M her daughter Sheila called her outside and on going out, she saw the deceased who was asking for help. She said he run to the back of the house where he followed him and she was able to see Accused 1, 2, 3 and Accused 4 beating him. She said they were all following him. She said that they had rungu and piece of a bed; that they broke the bed and used its pieces to beat the deceased. She said that they all beat the deceased and that she instructed her daughter to go and call his wife.
8. She further stated that they tried to kill her but she hid and the deceased's wife Lorna went and took him to hospital Marigat. She allowed them and on reaching Marigat, he was referred to Nakuru. She went to police station to report that night and in the morning, she received information that he died. She said she used D-Light to see the people who were beating the deceased. She identified pieces of bed used and rungu. She confirmed that Accused 3 had the rungu while the rest had pieces of bed. She testified that Accused 2 hit her with stones saying they should kill her.
9. PW3 Chrisphas Kipkosgei Tekuna a mortuary attendant testified that on 22nd September, 2019 he was at home and at around 8:30 pm, he heard screams and two young men informed him that someone had been beaten. He then went to the centre of Ngoswe and while going there three men being Accused 2, 3 and 4 bypassed them and went. He further stated that at around 9 P.M, they heard screams and on going to the home where screams emanated from, they found the deceased lying down and saw blood on his body and he was not talking; they took him to the road where he was taken to Marigat Hospital. He said he was informed that he died the next day and that he never saw the person who beat the deceased. He said the incident occurred at Mary's house and that he never found any one at Mary's home and that they found the deceased alone.
10. Pw4 Sheila Naserian testified that on 22nd September, 2019, she was at home with her sister Sarafina, Major, Shakira and her mother when the deceased run to her home around 8 p.m. as there were people chasing him. She said the deceased was calling out for Mary to rescue her. She said the Accused 2, 3 and 4 started beating the deceased with whips they had. She said that the 3 of them beat the deceased and that her mother came out when they started fighting. She said that they screamed and Sarafina went to call deceased's wife. She said pieces of timber from a bed which was the accused persons side were used to beat the deceased and the deceased's wife arrived after he had been beaten. She said she was however not present when deceased's wife arrived as she had gone to hide when the deceased was being beaten. She said she went to police station with her mother, Shakira and Sarafina. She said she never saw Accused 1.
11. Pw5 Sarafina Naitalim testified that on 22nd September, 2019 at 8 pm, she was outside her home while her mother was preparing supper inside their home when she heard noise and shortly, a person asking



- for help went to her home. She said her mother went out with D-Lite and she was able to see Hamisi the deceased herein. She said the deceased who did not look injured entered the house and there were people following him. She said that he was beaten inside the house using a jiko (charcoal jiko). That the house is 2 roomed.
12. She said her mother was in the sitting room cooking and she came out and flushed D-lite. That Hamisi (deceased) had entered the gate after which 4 who are accused herein followed him. She said her sister Sheila was with her outside and confirmed the accused entered the house and attacked the deceased inside the house using a jiko and they also had one rungu while inside the house. She confirmed that they removed pieces of wooden bed and used to hit him on the head. She said her mother asked her to go and call Hamisi's wife Lorna whom she found and went to the scene with her and on arriving back, they found the accused persons had left and Hamisi's condition was bad. She confirmed the deceased's wife called motor cycle which took him to hospital and the next day they were informed that Hamisi had died.
 13. PW6, Lonah Kibelion testified that on 22nd September, 2019, she was at home at 6:30/7 p.m. when her husband Hamis Salim Abdala the deceased herein sent her to her mother to collect some money. She arrived home at 6:00 a.m and on going back at around 7pm, she met her husband at the gate back who asked her if she succeeded in getting the money.pw6 informed him that she had Kshs 2045.she gave him Kshs 5000 and the deceased told her he was going to the butchery to collect meat and promised to be back in 10 minutes.Pw6 said she went to the house to feed children and after 10 minutes, her husband had not gone back; shortly after, she heard loud screams and on going outside, she realized the noise was from a neighbour Mary Cheptoo. She said she heard someone say "hit the head" she went back to the house after her child followed her.
 14. She said thereafter, she heard Sara a daughter to Mary call her and told her they should go to her home as Baba Korir was being beaten. On inquiring further, she was told Lenti, Chirchir, Elijah and Davy are the ones who were beating him. That Lenti is 3rd accused, Chirchir is Accused 4th Accused, Elija is Accused 2, while Davy is Accused 1 and she said she knew them because they grew up together in the village.
 15. She said she accompanied Sara (Pw5) towards the gate and on reaching the gate, she heard the voice of the 4 young men from Mary's house saying "huyo Tumemaliza" meaning "that one, we have finished". She said she went back and used a different route and on reaching Mary's house, a boy called Dickson who showed her where her husband was lying near the fence and had a cute on the face and was bleeding. She said she used light from her mobile. She said she went to Ngoswe Centre for motor cycle rider who took her husband to Marigat hospital. She said he was transferred to Nakuru hospital; the next day at 9:00 a.m they were informed that he had passed on. Post-mortem was done the next day on 23rd September, 2019.she said did not see the accused persons beat the deceased but it is Sara (pw5) who gave her their names.
 16. Pw7 Abdi Charti Olesae testified that on 23rd September,2019, he was in town at around 9/10 p.m. when he received a call informing him that his cousin Hamisi had been injured. He went to hospital and arrived at 10P.M and found him unconscious. He said he had deep cuts and was complaining of serious pain. He accompanied him to Nakuru and came back. The next day he learnt that the deceased had died. He went to Marigat police station to report and recorded statements at DCI's office. He said he did not see the people who inflicted injuries on deceased but he was told its Accused 1, 2, 3 and 4. He later identified the deceased's body for posmortem. He said the deceased's wife gave the DCI names of the persons who attacked the deceased.



17. Pw8 Collins Kibiwot Kitur a motor cycle rider testified that on 22nd September, 2019 from 8 to 9 p.m., he heard the deceased's wife screaming for help and on reaching the scene, he saw the deceased lying down. He confirmed taking him to Marigat hospital Marigat Hospital. He said the deceased was bleeding from the head and they used mobile phones torch for lighting. He said he did not know who injured Khamisi.
18. Pw9 Richard Kiprono a brother to the deceased testified that on 22nd September, 2019, he was informed that the deceased had been injured and he assisted to take him to hospital. He said in the ambulance to Nakuru, the deceased was unconscious and was unable to identify them. He said he was present when post-mortem was done. He added that they later came to know the people involved from the deceased's wife Lorna and that he did not witness the deceased being attacked.
19. Pw10 Dr. George Biketi a Medical Practitioner conducted post-mortem at Nakuru Level 5 Hospital mortuary on 23rd September, 2019 on the body of the deceased Salim Abdala Hamisi. She testified that the body had blood-stained hands with multiple defence wounds on both hands, deep cut wounds on skull, all the wounds had been stitched. She concluded that the cause of death was severe head injury from severe trauma to the head. He produced the Post Mortem report dated 23rd September, 2019 in court as exhibit.
20. Pw11 No. 68641 PC Okinyi Akoth who was stationed at DCI Marigat Baringo testified that on 23rd September, 2019 he was asked to follow up on a murder case which occurred in Ngoswet. He visited the scene on 24th April, 2019 with his colleagues and found a blood-stained wood. He said his colleague Denis Oteni who recovered the grey jacket at the scene and kept the jacket as an exhibit. He said the jacket belonged to the deceased and that they arrested David Tuisang alias Davy and Elija Kamalal and the other 2 accused persons were later arrested in his absence.
21. Upon the close of the prosecution's case, by ruling delivered on the 18th day of January, this court found that a prima facie case had been established to warrant the accused persons be placed on their defence.

Defence Evidence

22. DW1 Simon Kipruto Kipsang alias Davy denied the charges. He said that on 22nd September 2019, he was on his usual duties and that he went to Mary's house to drink at 6 pm and found many people in the home. He said that he did not know most of them as that was not his village. He said he did not see the deceased Hamisi and that he did not have a good relationship with Nickson (Accused 3) as he had leased his father's land and he was not happy with it. He denied allegation that he was in the fence as the other people beat the deceased.
23. He said he heard screams emanating from Ngoswet at a distance and he did not participate in the killing. He said he was arrested while doing his work and came to know that it was because he had leased land to plant maize. He said that he also found the house he lived in was demolished and the fence of the land he had planted vegetables demolished.
24. DW2 Elija Lesipian Kamalal who is accused 2 stated that on 22nd September, 2019 at around 6 p.m, they were at Mary's home drinking with Accused 1 and that they drunk in excess and there were two girls in the home one selling changaa and the other guarding. He said one talked with Accused 1 which made the deceased annoyed and slapped Accused 1, got hold of him and threw him out. Accused 2 said he asked the deceased why he was doing and he responded that he would not talk to uncircumcised person. He said the deceased slapped Accused 1 the second time and Accused 1 defended himself.



25. He said Accused1 threw him outside then went to the gate to prevent him from going and hit him with pieces of bed. He said him and A3 chased the deceased and went straight home and after 2 days, he learnt that the deceased had died.
26. DW3 Nickson Lentil Lelebo testified that on 21st September, 2019, he was at Mary's home drinking at around 6 p.m when he saw Accused 1. He said that he had worked for Accused 1 and when he finished the money he had, he asked A3 to pay his debt but he did not have the money. He then asked Accused 1 how he could have money to drink yet he was not paying his debt and they disagreed. He said he pushed him and he was removed outside by Dickson and on going outside, he went home and after 2 days he heard that there were people who fought at Mary's house and a person was killed.
27. DW4 Alex Kamalal who is Accused 4 stated that on 22nd September, 2019 at around 6 p.m, he was with many others at Mary's house drinking alcohol inside the house up to around 7 p.m. He said he was with 2 daughters of Mary and that he did not see Accused 2 and Accused 3 and that he saw Accused 3 towards the end as he fought with Accused 1. He said when the fight started, he left. He said that he did not know why Accused 1 and Accused 3 fought as they spoke softly and he did not hear what they were saying hence he left and after two weeks, he was informed that the deceased herein died. He said that he did not see the deceased in the house.

Analysis and Determination

28. I have considered evidence adduced and wish to consider whether the ingredients for the offence of murder have been proved beyond reasonable doubt. The ingredients for murder as specified under section 203 as read with section 204 of the Penal Code are as follows: -
 1. Proof that the deceased died,
 2. That it was the accused's unlawful act that led to his death, and,
 3. That the murder was carried out with malice aforethought.
29. It is not disputed that the deceased Khamis Salim Abdallah died on 23rd September, 2019. The death was confirmed by Dr. George Biketi who conducted post-mortem at Nakuru Level 5 Hospital mortuary on 23rd September, 2019 on body of Salim Abdala Hamisi and found that the cause of death was severe head injury from severe trauma to the head. He produced the Post Mortem form which he signed on 23rd September, 2019.

(ii) Whether the accused persons caused the deceased's death

30. The next issue is whether the accused persons unlawfully caused the death of the deceased. In the case of *R v Guzambizi s/o Wesonga* {1948} 15 EACA 65 the court held that every homicide is deemed to be unlawful unless it is excusable or justified in Law, or in reasonable defence of self or property.
31. In their defence all the 4 accused persons placed themselves at the scene. Each of them confirmed that they were drinking at Mary's (Pw2's) house where they were drinking alcohol on the material day. Pw1 testified that he was drinking with accused persons and the deceased when Accused 1 fought with the deceased. From the evidence of PW2 and PW 4 and PW5 after Accused1's confrontation with the deceased, the accused persons followed the deceased outside and attacked him with a jiko and broken pieces of bed. They stated that accused persons beat the deceased until he was unconscious. From the evidence of the prosecution witnesses, the accused persons hit the deceased severally with the broken pieces of bed which was at the scene hence the deceased sustained serious injuries which eventually led to his death. The injuries the deceased sustained were consistent with the doctor's evidence who upon



performing post-mortem found that deceased's body had blood-stained hands with multiple defence wounds on both hands, deep cut wounds on skull and in conclusion, they found cause of death was severe head injury from severe trauma to the head.

32. From the foregoing, I find that the prosecution proved beyond reasonable doubt that the 4 accused persons unlawfully killed the deceased herein.

(iii) Whether the accused persons caused the death of the deceased with malice aforethought.

33. Section 206 of the Penal Code defines malice aforethought as the intentional killing of the deceased or to do grievous harm to any person whether that person is the person actually killed or not or knowledge that the act or omission will result into the death of a human being.

34. The formulation of the Law on manifestation of malice aforethought is as illustrated in Tubere s/o Ochen [1945] 12 EACA 63. Where the court stated that the relevant characteristics contributing towards the death being considered as being committed with malice aforethought include the nature of the weapons used, the manner it was used to inflict the injuries, the parts of the body targeted whether vulnerable or not, the nature and gravity of the injuries, and the conduct of the accused before, during and after the incident. (See also Dafasi-Magayi v Uganda {1965} 1 EA 667).

35. I take note of the fact that the deceased and accused were drinking together and at the time of the incident; they were all drunk. From evidence adduced, the deceased confronted Accused 1 for talking with a girl who was at the drinking den. A fight ensued and the other 3 accused persons joined. I take note of the fact weapons used to inflict injuries that led to the death of the deceased were pieces of the timber from the bed outside Mary's house. From the evidence adduced, there is no indication that accused person had planned to kill the deceased. Their minds were impaired by alcoholic drinks and in my view did not possess rational thinking. From the foregoing, I find that there is no prove of malice aforethought beyond reasonable doubt. I therefore proceed to jointly convict the 4 accused persons with the offence of manslaughter.

36. Final Orders: -

I hereby find A 1,2,3 and 4 guilty of the offence of manslaughter and jointly convict them under section 215 of the CPC.

JUDGMENT DELIVERED, DATED AND SIGNED IN VIRTUALLY AT KABARNET THIS 2ND DAY OF MAY 2024.

.....

RACHEL NGETICH

JUDGE

In the presence of:

CA Elvis.

Ms. Ratemo for state.

Mr. Kipkulei for Accused 1.

Mr. Chepngoswa for A 1,2 & 3.

