



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

CRIMINAL CASE NO. 12 OF 2019

REPUBLIC.....PROSECUTION

VERSUS

MAGDALINE NDUKU KIIO.....1ST ACCUSED

ERICK KIIO KITUKA.....2ND ACUSED

SAMMY KIIO KITUKA.....3RD ACCUSED

JUDGMENT

1. **Magdaline Kiio, Erick Kiio and Sammy Kiio** referred to as 1st, 2nd and 3rd accused (A1, A2 and A3) are facing two counts of murder contrary to **Section 203 as read with Section 204 of the Penal Code**. It is alleged that on the 10th of April 2019 A1, A2, A3 jointly murdered Paul Kawai Kivungi (1st count) and Rosalia Munangu Mathukilu (2nd count) at Kithangathini village, Kyang'a sub-location Ndolo location, Kilungu sub-county within Makueni County.

2. All the accused denied the charges and the case proceeded to full trial with the prosecution calling 14 witnesses to prove its case. The accused were all represented by learned counsel Mr. Judah Kioko.

3. **PW1 Rhodah Mbithe Munyao** testified that on 10th April 2019 at about 8.00 am she was on her way to the shamba (*farm*) with Paul Kawai, Rosalia Munangu (*the deceased persons*), Maurice Munyao and Kioko Munyao (*her sons*). The late Paul was leading the way. She then heard A1 (whom she had earlier seen and whom she knew well) shouting saying "*This is Kawai – Let's kill him.*"

4. Minutes later A2 and A3 who are A1's sons appeared while armed with an axe and a panga (*machete*) respectively. They ran after the late Paul who slipped and fell. It was at that point that A2 cut him near the eye on the head, with an axe. A1 continued screaming and shouted, "the mother is also there, kill him."

5. She stated that A2 and A3 climbed up to where the late Rosalia was. While there A2 raised his axe and told the late Rosalia "*follow your son*". PW1 heard a loud bang like something dropping and she knew things were bad. Kioko Munyao ran away while Maurice watched from a far. She called her husband while A2 and A3 bragged on how nothing could be done to them.

6. People including the administration came to the scene. The two deceased had injuries on their heads and were already dead. It was her evidence that she did not see A3 use his panga at the scene. She later found herself at the police station where she recorded a statement. She was able to identify the panga and axe (EXB 1&2) A2 and A3 had on the material day.

7. In cross examination she confirmed that she had heard from her brother-in-law Gabriele that there had been a problem over that land and a case had been filed in court. She further confirmed the presence of all the accused persons at the scene and what they each did. Accused 1's house is on a hill and she was speaking from behind the house.

8. **PW2 Maurice Munyao** is a son to PW1 and was with her on this fateful day. He gave similar evidence to that of PW1 in respect to the injuring of the late Paul Kawai by A2. On seeing this him and PW1 ran to the bush. He saw A2 and A3 head to where the late Rosalia was. He heard her shout "*don't kill me*". He did not see what happened next. Police later came and A2 and A3 were arrested. They showed the police where the weapons were after a beating. He confirmed that the deceased had injuries on their heads.

9. In cross examination he said A3 did not use his panga at the scene. Further that the land where this incident occurred has a dispute.

10. **PW3 Joseph Mathokilo Kivungi** is a father and husband respectively of the deceased persons. He did not witness the incident. He only received a report. **PW4 Gabriele Matina Kivungi** (a brother and son) of the deceased respectively only received a report of the incident. He visited the scene and saw the injuries on the bodies. He said he knew all the accused persons as they had all assaulted him twice before. **PW5 Rose Munyanga Mutua** identified the deceased's bodies for postmortem on 15th April 2019.
11. **PW6 Andrew Munyao Mathukilu** who did not witness the killing testified that A2 and A3 had once attacked him and his brother on the shamba (*farm*) in issue and they had been placed on probation. He further said that a judgment had been delivered by the Machakos High Court in a matter over the suit land on 6th February 2019. The accused did not comply with the orders and they were summoned to the County Commissioner's office for the judgment to be explained. They however committed the offence the following day.
12. **PW8 Beatrice Kawai** the wife of the late Paul Kawai learnt of the happenings later after the incident. She did not know the killers as she was not at the scene.
13. **PW9 Nicholas Nzioka Mawere** received a report of the killing and went to the scene. He found the bodies of the deceased. The accused persons had taken the police to where the murder weapons were. He knew the father of A2 and A3. **PW10 Anastancia Makuta** received a report of the killing. She notified the village elder of the same.
14. **PW11 Robert Shinoli** visited the scene with others after receiving the report while at the District Commissioner's Office Kilungu. A2 and A3 took them to the bush where EXB1 & 2 were recovered. The latter had blood on it.
15. **PW12 Sgt. Paul Kiilu (NO 46623)** of Scenes of Crime testified that the scene photos were taken by the Investigating Officer P.C. Mureithi who handed them over to him in form of a C.D., and he took them for printing. The photos were produced as EXB3 a-c. They showed the deceased persons lying in different positions.
16. **PW13 P.C. Eustace Murithi Edward NO 61418** was the Investigating Officer. He visited the scene where he found A.P.s, the suspects and a peaceful mob. The suspects led them to the recovery of the murder weapons which he produced as EXB 1 & 2 (*Panga and axe*). He confirmed seeing injuries on the deceased's bodies. He also confirmed that the accused had been at the County Offices for an explanation of a Judgment to them.
17. **PW14 Dr. Patrick Kihyu** with the consent of the defence produced the two postmortem reports as (EXB 5 & 6). It was his finding that the weapon used in both cases was a sharp object. Further that the cause of death for both victims was excessive blood loss.
18. When placed on their defence A1 and A2 each gave sworn evidence. The 1st accused Magdalene Nduku Kiio, testified that she was a teacher at Kainga Springs of Hope Academy. That on 10 /04/2019 she was with A2 & A3 whom she sent to get water as she prepared tea, which they took together. She later sent A2 to get firewood and A3 to prepare a place for planting. They took an axe and jembe (hoe) respectively while she remained behind to go for a family meeting.
19. A neighbour then came to inform her that A2 had a fight with someone and that the person, had fallen and she had seen Kawai coming to her home. She then called nyumba kumi chair who refused to come, and she saw people coming to her place. She called the village elder who said that he would call the chief by himself. A2 and A3 were in the compound and she also identified herself to the police. She saw two bodies being carried. She said that she had been told by a relative that they had won the case in Machakos. She confirmed that her family and that of the deceased had a bad relationship.
20. **A2, Eric Kiio Kithuka** testified that he was 16 years old and a student at Kenya Israel technical College in Machakos studying Mechanics and driving. He recalled that on 10/04/2019 their mother (A1) sent them to get water and when they returned they took tea together. They were assigned duties by A1 and he took an axe to get firewood while A3 took a jembe and went to the shamba (*farm*). On his way, he met Kawai (deceased) who asked him what he was doing on their land. He told Kawai that the land was theirs and that is when they started quarrelling.
21. He stated that Kawai had a rungu (club) which he threw at him and it hit him. He used his axe to cut Kawai who fell down, and he went away to get firewood. On the way he met Kawai's mother and cut her as well. This was after he asked her where she was going and she said she was going to the shamba (*farm*). He thereafter went to look for A3 whom he informed of what he had done. A3 asked him why he had done that and he told him that it was because of the way they had troubled them. They were then arrested by the police.
22. A3 when placed on his defence elected to rely on the evidence of A1 and A2 and so did not give any evidence.
23. After the close of the defence case both parties filed written submissions. Mrs Gakumu Anne learned prosecuting counsel submitted that PW1 and PW2 were eye witnesses. It was their evidence that A1 lied to save herself while A3 chose to remain silent for the same reason. She urged the court to find that the prosecution proved its case by establishing that the deceased persons met their untimely death in the hands of all the accused persons.
24. Counsel went on to submit that the court ought to consider the provisions of sections 20 and 21 of the Penal Code which applies to the facts in the case at hand. Their common intent may be inferred from their presence, their actions and omission of either of them to disassociate himself from the assault. Learned Counsel urged the court to find that A1, A2 & A3 combined for an unlawful purpose in which the two deceased were killed which then constitutes *actusreus*. It was therefore the prosecution's prayer that this court finds all the accused persons guilty of murder.
25. Learned Counsel referred the court to the following cases when considering the accused persons' participation in the commission of the offence:

(i) **Antony Kinyanjui Kimani v Rep [2011] KLR Court of Appeal Criminal Appeal No. 15/2007.**

(ii) **Njoroge v Republic [1983] KLR 197 at page 204.**

(iii) **Republic v Tabulyenka s/o Kirya [1943] EACA 51.**

(iv) **Dracaku s/o Afia v Rep [1963] E.A. 363**

26. Learned Counsel Mr. Kioko, for the defence submitted that for the prosecution to secure a conviction for the charge of murder against the 1st and 3rd accused persons it has to prove the three ingredients required. He further submitted that the second accused admitted to having caused the death of the two victims herein.

27. Counsel submitted that PW1 and PW2 who were eye witnesses in this case had evidence that was not coherent and should therefore not be considered as the truth, given that there was bad blood between the two families. It was his further submission that the court must determine whether there was malice aforethought in inflicting the injuries on the victims. Mr. Kioko concluded that there was no evidence by the prosecution to prove malice aforethought on the part of A1 & A3 and so the State failed to prove its case beyond reasonable doubt against A1 & A3 and that the A2 should be convicted on his own admission for the charge of murder.

Analysis and determination

28. The offence of murder is defined under Section 203 of the Penal Code as follows:

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

29. From this definition the essential ingredients of this charge are:

(i) Proof of the death of the victim.

(ii) Proof that the killing was unlawful and was committed by the accused (actus reus).

(iii) Proof that the killing was accompanied by malice aforethought (intention/mens rea). See Republic vs Mohamed Koran [2014] eKLR.

30. Malice aforethought has been defined as follows under Section 206 of the Penal Code:

“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.”

31. On proof of death majority of the witnesses who are close relatives to both deceased have confirmed their death. The bodies were well identified before the postmortem was conducted. The postmortem reports EXB 5 & 6 gave the cause of death in both cases as excessive bleeding following head injuries. This cannot be said to be natural death.

32. The next issue is proof of *actus reus*. PW1 who was at the scene testified that she saw A2 hit both deceased persons with an axe at different times. It was morning hours and so there was sufficient light. On the other hand PW2 said he saw A2 hit the deceased (Paul) with the axe. He did not witness him injure Rosalia but he overheard their conversation. A2 in his sworn evidence admitted having hit both deceased persons at different times. He used an axe to cause the injuries.

33. From the evidence of PW1, PW2 and A2 himself there is no doubt that A2 is the one who physically killed the two deceased persons. He has admitted that in his sworn defence.

34. The Eastern Court of Appeal in the case of **Republic v Tubere S/O Ochen [1945] 12 EACA 63** held and acknowledged that in determining whether malice aforethought has been established the following elements should be considered:

(1) The nature of the weapon used.

(2) *The manner in which it was used.*

(3) *The part of the body targeted.*

(4) *The nature of the injuries inflicted either a single stab/wound or multiple injuries.*

(5) *The conduct of the accused before, during and after the incident.*

35. The next issue in respect to A2 is whether his killing of the deceased persons was intentional. In other words was *mens rea* proved? The murder weapon was an axe (EXB2) which is a dangerous weapon. A2 used it to hit each of the deceased on the head. PW14 Dr. Patrick Kihiu who produced the post mortem reports (EXB5 & 6) said the cause of death was excessive bleeding in the head of each of them. It is therefore clear that A2 targeted the heads of the deceased armed with a dangerous weapon whose results were fatal. The deceased in the 1st count (Paul) suffered two injuries on the chest and head. The deceased in the 2nd count (Rosalia) suffered two injuries on the head. It is clear that the parts of the body that were targeted by A2 were delicate ones.

36. In his defence A2 explained that he had attacked the deceased persons because of the way the deceased's family had troubled them over land. In other words, he took the law in his own hands for pay back.

37. There is no evidence that the deceased persons attacked A2. He stated that the deceased (Paul) had thrown a rungu at him and it hit him. There is no evidence to support that assertion. After injuring the deceased persons A2 simply walked away. Both deceased died on the spot. This confirms the seriousness of the injuries which led to the death of the deceased persons.

38. Upon considering the nature of the weapon used (axe), the force applied to it and the parts of the body targeted (chest and head), the serious nature of the injuries and A2's conduct before and after the incident I am left in no doubt that A2 knew what he was doing. He executed his intention very well and to his satisfaction.

39. It is also not lost to the mind of this court that this incident occurred a day after a judgment from Machakos High court in respect to this land in issue had been read and explained to the parties with A1 being one of them. If they were aggrieved they ought to have moved to the Court of Appeal by filing an appeal. I find malice aforethought proved. The conclusion is that a charge of murder contrary to section 203 has been proved against A2.

40. The next issue I move to relates to the role played by A1 and A3 in this murder. There is no evidence of A1 and A3 having physically injured any of the deceased persons. Why were they then charged alongside A2?

41. Both PW1 and PW2 testified that A1 called out to A2 and A3 telling them to kill the deceased persons. They quoted A1 as having stated thus; *"There is Kawai. Let's kill him"*. A1 is the mother of A2 and A3 who are youths. She was outside her house as she allegedly gave the directions to the boys. She was later heard to say; *"The mother is also there kill her."* Rosalia was Kawai's mother. In her evidence A1 only mentioned that A2 and A3 left with a panga and an axe to do some work. The rest was only known by her when people came to her home. A3 elected to say nothing in his defence and chose to rely on the evidence of A1 and A2.

42. The evidence by PW1 and PW2 is that A1 on seeing the two deceased persons at different intervals called on her sons (A2 and A3) to go and kill them. The boys who were armed with a panga and axe (EXB1 & 2) left to attack the deceased. A2 and A3 are said to have first run after Paul (deceased) who fell down That is when A2 hit him with the axe in A3's presence. Soon thereafter Rosalia (deceased) appeared and A2 also hit her on the instructions of A1.

43. Even though A1 did not hit the deceased, she was clearly heard by PW1 and PW2 encouraging or directing the boys to kill them. Even after Paul Kawai was killed she went ahead to encourage her sons to kill his mother (Rosalia) as well. She knew that hitting the deceased with the weapons they had, would end their lives which was her intention from her utterances. A1 is an adult with a sound mind and she was the one instructing her sons to commit the offence.

44. As for A3 he was armed with a panga (machete) and was moving with A2 in compliance, with their mother's directions. He participated in chasing Paul Kawai (deceased) until he fell down. It is after the fall that A2 hit him. All along A3 was operating with A2 on their mother's (A1) instructions.

Sections 20 & 21 of the Penal Code provide as follows:

"20 (1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say—

(a) every person who actually does the act or makes the omission which constitutes the offence;

(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

(c) every person who aids or abets another person in committing the offence;

(d) any person who counsels or procures any other person to commit the offence,

and in the last-mentioned case he may be charged either with committing the offence or with counselling or procuring its commission.

(2) A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.

(3) Any person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part is guilty of an offence of the same kind, and is liable to the same punishment, as if he had himself done the act or made the omission; and he may be charged with doing the act or making the omission.

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.”

45. These two provisions actually deal with a scenario where one would be found to be an accomplice. See the case of **Anthony Kinyanjui Kimani v Rep [2011] eKLR (Court of Appeal)**.

46. In the case of **Njoroge vs Rep [1983] KLR 197 at page 204** the Court of Appeal stated this:

“If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder in all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavours to effect the common object of the assembly.”

47. The evidence on record confirms that there was a long standing land dispute between the accused’s and deceased’s families. A Judgment in favour of the deceased’s family had been rendered by the Machakos High Court and the accused’s family were not complying with it. The parties had the previous day been summoned to the Kilungu Sub County offices for an explanation of the said judgment. The incident occurred the next day. The killing was in reaction to the decision on the land dispute. A1’s act of directing and inciting A2 and A3 to kill the deceased constitutes an act of an accomplice which is well covered by Sections 20 and 21 of the Penal Code.

48. Further A3’s actions of arming himself with a dangerous weapon (EXB1) and chasing the deceased (Paul Kavai) with A2 until he fell, confirms their common ill intention, even if he did not personally hit him. They remained together even after their unlawful action until the police arrived and arrested them. This is also well covered by Sections 20 and 21 of the Penal Code.

The evidence shows that the accused persons were operating together and had one intention which was one of killing the deceased persons.

49. I am satisfied that both A1 and A3 were accomplices who actively participated in the killing of the deceased persons. On my part, I find A1, A2 and A3 all guilty of murder contrary to section 203 as read with Section 204 of the Penal Code on the two (2) counts, and I convict them accordingly.

SIGNED AND DATED THIS 24TH DAY OF FEBRUARY, 2021 AT MILIMANI NAIROBI.

H. I. ONG’UDI

JUDGE

DELIVERED IN OPEN COURT AT MAKUENI ON THE 4TH DAY OF MARCH 2021 BY:

GEORGE DULU

JUDGE