



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL CASE NO. 20 OF 2016

REPUBLIC.....PROSECUTION

VERSUS

KARISA MAITHA THOYA ALIAS NDISO.....1ST ACCUSED

SAID KARISA MAITHA ALIAS MOTO.....2ND ACCUSED

BAYA KARISA MAITHA.....3RD ACCUSED

CLENTONE KAZUNGU KARISA MATIHA.....4TH ACCUSED

CORAM: Hon. Justice R. Nyakundi

Mr Victor Alenga for the state

Mr Mouko advocate for the Accused persons

J U D G E M E N T

The accused persons are charged with the offence of murder contrary to section 203 as read with 204 of the Penal Code. The brief facts of the offence was that on the 24.11.2016 at Duke Village, in Chamari sub-location, within Kilifi, accused persons jointly with others murdered **JEREMIAH KOMORO GUYO**. Each of the accused duly represented by counsel Mr Mouko pleaded not guilty to the charge.

The prosecution case has been handled by many prosecutors with the last one being Mr Victor Alenga, Senior Prosecution Counsel. Their case is as based on the evidence of six witnesses. That summary of evidence is as follows; -

Pw1 Pastor Joshua Nyamawi testified to the effect that on 21.11.2016 he was conducting a church service with his congregation in a church built within his compound. On that particular day, there was night vigil for the worshippers to stay overnight he however left for his house, in the course of the night, and later stepped out to answer the call of nature. That is when he came into contact with the legs of a human being. On a closer look he identified the person as **Karisa Thoya** the first accused in this trial. The short conversation they held was a warning from the accused that his family members should not be allowed to participate in the worship. It happened that the first accused was armed with a panga which he aimed at Pw1 with a view to inflict harm. According to Pw1 he sought assistance from the members of the church who included one Baraka and a son to the 1st accused. The accused was therefore disarmed of the panga. However, Pw 1 stated that he thought it wise to report the incident to the village elder, the Assistant Chief, the locational chief and subsequently the police station. In the morning (Pw 1) saw the 1st accused with his elder son demanding that he drops the complaint he made to the various security agencies. Further Pw 1 stated that as he was waiting for the chief's directions, he went to the forest to procure some timber. On his way back he was informed that the accused persons had maliciously damaged the church property. The people he left behind collecting timber had also been attacked. That was the time the deceased also got assaulted sustaining fatal injuries.

On cross-examination (Pw1) told the court that he happened not to be present at the actual incident of an attack against the deceased.

The next witness called by the Prosecution was **Mariam Guyo** (Pw2) sister to the deceased who was assaulted on 24.11.2016 and thereafter succumbed to death. Pw2 narrated the ordeal in which two boda boda riders ferried some people at (Pw1's) home. She was able to identify the first, second and third accused persons for being part of those people who went to (Pw1) house. It was her evidence that on arrival at (Pw1's) home, they set the property on fire. The same arsonist are the ones who turned against her and the deceased by inflicting physical harm. According to Pw 2 it was from those injuries suffered that the deceased died soon thereafter.

Next was the evidence of Pw3 – **Salama Bashora** the widow to the deceased. In her testimony on the 24.11.2016 while at home on or about

4.00Pm they heard shouts and screams from (Pw1) house. Some of the screams indicated that (Pw1) house has been burnt down. In a little while, Pw3 saw the alleged people also confront them and proceeded to inflict harm to Pw2 and the deceased. She however managed to take flight from the scene before the attackers could get hold of her to cause maim. The following morning, she was to learn of the deceased death arising out of the initial assault. On cross-examination Pw3 testified that she did not manage to witness the actual attack against the deceased.

Her testimony was followed with that of Pw4 Lenox, the clan elder of the area where the killing occurred. Pw4 evidence was to confirm that a report was made by (Pw1) regarding the arson incident upon his property. That was followed with another offence of an attack against the deceased. Further Pw4 told the Court that given the term of evidence they assessed in effecting the arrest against the accused persons as suspects of the arson and murder of the deceased. Pw 4 evidence was also collaborated with that of Pw5 – Joseph who happened to be the Locational Chief.

Finally, was the testimony of the investigating officer Chief Inspector Justus Kibo (Pw6). In his evidence this was initially an assault case, but following the death of the deceased, it was escalated to a murder charge for purposes of the instant case. In his investigations correlated the witness statements and post mortem examination which was admitted in evidence under section 77 (1) of the evidence Act. In the postmortem the pathologist opined that the deceased cause of death was head injury leading to internal haemorrhage. That formed the foundation of the prosecution case.

Defence Case

The first accused Karisa Maitha told the Court that he did not commit the offence. It was defence that he came to know of the deceased death while attending a burial at a neighbour's home. In support of his defence the accused summoned the evidence of his wife (Dw5) and his son who testified as DW6. The net effect of their testimonies was to inform the Court of the arsonists who made entry to their home and torched the properties. According Dw5, the 1st accused was never at the scene having spent the day at the bereaved family. The testimony by Dw5, was in all material similar with that of Dw6 re-affirming that a gang of people went to their home burning houses, carrying away movables and maliciously damaging other properties. He denied any involvement of the 1st accused with the killing of the deceased.

Dw2 Said Karisa, on his part also gave his side of story denying the act of killing the deceased. He only recalled that on his return home he found their homestead having been destroyed by fire. As for the third accused he told the Court that as motor cycle operator, his place of business happened to be Malindi. As regards the fateful day, the accused told the Court that it was neither near nor at the actual scene. It was only after learning of the arson and destruction of property did he visit the house to verify the circumstances of the damage. Finally, the fourth accused also joined in by denying that he participated in the killing of the deceased as alleged by the prosecution witnesses.

With these strands of evidence in mind, it is now my task to evaluate it and establish whether the prosecution case meets the threshold of beyond reasonable doubt.

Analysis and Determination

In the instant case it is trite that the standard of proof is that of beyond reasonable doubt as expounded in the cases of *Minister V Minister of Pensions [1947] 2 ALL ER 372 and Woolmington V DPP [1935] AC 462*. Therefore, the duty to prove existence of a fact to secure judgement against the accused persons is vested wholly upon the prosecution. It can only shift in circumstances provided for under section 111 of the Evidence Act. However even in those circumstances nothing falls short of the prosecution discharging the burden of proof of beyond reasonable doubt.

In the instant indication the prosecution is called upon by the dictates of the constitution under Article 50 (2) (a), to disapprove the innocence of the accused persons on the basis of the evidence against the indictment. It is settled law that for an offence under section 203 of the penal code, the prosecution must prove the following elements; -

- a) ***The deceased death***
- b) ***That the death was unlawfully caused***
- c) ***That in causing death the accused persons did so with malice aforethought***
- d) ***Finally, that the accused persons directly or circumstantially participated in the killing of the deceased.***

As regards the ingredients on the deceased death and the fact on the death being unlawful there is ample evidence from Pw1, Pw 2, Pw3, Pw4, Pw5 and Pw6. It is clear that the initial incident occurred at (Pw1) home when his property was burnt and destroyed by the arsonists. The arsonists were ferried in his home in two motor cycles. Their unlawful activities did not end there but further perpetuated them by extending it to the home of the deceased. The accused persons as described by Pw 2 acted in concert in committing the acts of arson, theft and assault. It is at that juncture the deceased suffered serious bodily harm inflicted by the same arsonists. The body of the deceased was subjected to postmortem examination by **DR IMRAN** establishing injuries to the head and opined it to be the cause of death. The totality of the evidence points to the accused persons as narrated by Pw 2 to have committed unlawful acts at the home of Pw 1 before descending to the deceased homestead. This was a joint prosecution of the crime by the accused persons defined under section 21 of the Penal Code as follows:-

“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.” In the case of *Njoroge V R 1983 KLR 197*

and Solomon Munga V R 1965 EA 363 both courts held; - "If several persons combine for an unlawful purpose and one of them kills a man, it is murder in all who are present whether they actually aided or abated or not, provided that the death was caused by act of someone of the party in the course of the endeavours to effect the common object of the assembly" Similarly R V Cheya 1973EA held that;- "The existence of common intention being the sole test of total responsibility it must be proved that the common intention was and that the common Act for which the accused were to be made responsible was acted upon in furtherance of that common intention. The presumption of constructive intention must not be too readily applied or pushed too far. The mere fact that a man think a thing likely to happen is vastly different from his intending that that thing should happen. The latter ingredient is necessary under the section. It is only when a court can with some judicial certitude hold a particular accused must have pre-conceived or premeditated the result which ensued or acted in concert with orders in order to bring about that result that this section can be applied."

In relation to this case there was sufficient evidence from Pw 1 and Pw2 and Pw3 that the criminal act in question was committed by the accused persons in furtherance of a common intention. This involved in the ordinary cause of invent visiting the home of Pw1 to torch down his property and with full knowledge of what they were doing they moved into the home of the deceased where further acts of assault and arson were committed. In concert they were aware of the precise means in which they were going to use to overpower and incapacitate their victims. For example in the context of the present case the 1st accused had a conversation with Pw1 that they should not allow his family to be part of the congregation at the church where he works as a pastor. At this juncture Pw1 did not envisage that serious criminal acts had been designed to destroy the church facilities and cause grievous harm to the congregants. It matters not who applied the fatal blow on the deceased as this was a common intention enterprise as defined under section 21 of the Penal Code.

Applying the rule in *Teper V R [1952]* in which *Lord Normand* said;-

"Circumstantial evidence must always be narrowly examined if only because evidence of this kind may be fabricated to cast suspicion on another. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."

First, it appears from the testimony of Pw1 the purpose behind the 1st accused camouflaging himself within the church compound was to exert himself with other several persons to further the criminal acts against Pw1 and the deceased family. It is no secret the circumstances of this offence there was no such third person who came to the scene seemingly to commit the alleged offences other than the 1st accused and his accomplices when they attacked the deceased they knew with certainty that he would die out of the serious injuries inflicted to the head.

All these pieces of evidence taken at their highest discharge the burden of proof on the ingredients of the deceased having died and that his death was caused through unlawful acts of grievous harm.

The next issue to consider is that of malice aforethought as defined in section 206 of the Penal Code under this ingredient, the prosecution must prove that the accused persons unlawfully acts were actuated with an intention to cause death or to do grievous harm, or be in a position of knowledge that their acts of causing death or inflicting serious harm would occasion death of the deceased. Malice aforethought as an element is at the heart of murder crimes which distinguishes it from other homicides. It may be proved by direct or circumstantial evidence. Malice aforethought is therefore the requisite mental state a killer must have in order to be found guilty of murder contrary to section 203 of the penal code. In this definition of malice aforethought under section 206 of the Penal Code there are two kinds of malice aforethought to place criminal responsibility for murder against an accused person. It is stated to be either express or implied malice. In express malice, the prosecution ought to prove that the accused person specifically intended to kill the deceased in question. Express malice is therefore a deliberate mind, formed and designed to kill another human being. Whereas in implied malice the evidence must demonstrate that the accused person mental element; conveyed an inferred or presumed malice in the killing of the deceased. He who intends a result usually knows that it will follow, and he who knows the consequences of his act usually intends them.

In the view of the law not only may malice aforethought be present when there is no actual design or premeditation to kill or do grievous harm, it may even co-exist with a definite wish that harm may be avoided, if an unlawful act is willfully done with knowledge and foreseeable that the death will occur or serious bodily harm. So far in the instant case direct evidence from Pw2 covers the entire scope of express malice on the part of the accused persons. Their hurting state of mind covers the unlawful acts of arson at the home of Pw1 which was perpetuated further to the home of the deceased where they inflicted fatal injuries as deduced from the postmortem examination report. A glance of the conduct of the accused persons from the testimony of Pw2 disclosed, that here there was express malice aforethought from the unlawful acts of assault targeting the head of the deceased. The evidence here necessarily shows that the willful act of assault under such circumstances was obviously a plan orchestrated to cause death of the deceased. In the case of *Rep V Tubere s/o Ochen [1945] 12 EACA 63*. Here the factors worthy consideration include, the make and use of dangerous weapons, the force used to target the vulnerable parts of the body, the substantial element of the nature of the injuries inflicted, the perpetrators conduct before, during and after the commission of the crime.

From this passage it appears where person's knowledge of a particular act occurring is to a certain degree of probability he may be taken to have intended that particular act. The success or failure of the prosecution case usually turns on whether the court can draw an inference of malice aforethought based on all the circumstances of the case including the state of participation in the criminal act and motivation of the accused persons.

Taking the evidence of Pw1, Pw2 and Pw3 the notion that the accused persons intended to kill the deceased or another person is manifested by the harm and damage inflicted both at the home of Pw1 and that of the deceased. If the purpose was only to commit acts of arson, malicious damage and theft the injury could not have assumed such a characterization targeted at the bodily injury of the deceased. The assault or beating of the deceased referenced the intent to kill or to cause serious bodily harm as defined under section 206 (a) & (b) of the Penal Code on malice aforethought. This dangerous force used against the deceased caused his death bringing the substantial element squarely for the offence of murder contrary to 203 of the Penal Code. To show that the killing of the deceased was actuated with malice aforethought the prosecution demonstrated that manifestation by way of post mortem examination report. In the presence of these circumstances as opined by the pathologist the mental element involved in the unlawful acts was that of killing another human being. Hence

it is very proper to make a finding that malice aforethought has been established beyond reasonable doubt to find the accused persons culpable as charged.

It is clear, however that notwithstanding the conflict as to who among the accused persons inflicted the brutal blow, no doubt each one of them actively and consciously participated in the crime of murder. It is imperative to state that in answer to the charge, accused persons raised an alibi defence.

For ease of understanding the 1st accused denied the charge of killing the deceased that he found himself being arrested for an offence he had no knowledge about or participation. Secondly, he recalled of a conflict between (Pw 1) charges which was a matter pending for resolution by the Assistant Chief. Thirdly he had attended a burial at the neighbours when the alleged murder was stated to have taken place.

The second accused in his narrative denied that he participated in the commission of the crime. That was also the case for the 2nd accused and 4th accused person distancing themselves from the scene of the murder. What the accused person told the court is the fact that when the murder was committed, they were not at the scene and so it is impossible for them to be connected with such an offence. However, from the evaluation of direct evidence by Pw 2 and circumstantial evidence adduced by Pw 1, Pw 3, Pw 4, and Pw 5 the allegation on alibi defence has no legs to stand on. The weight to be attached to alibi defence collapses given the materiality of the evidence by the prosecution witnesses in respect of positive recognition of the accused persons at the scene. In the case of *Anjononi & others V R[1980]KLR* the Court stated *inter alia*:-

“Recognition, not identification, of the assailants; more assuring; and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”

Based on the above analysis I find that there is no doubt in the prosecution evidence of proving the elements of the crime of murder contrary to section 203 of the Penal Code beyond reasonable doubt. In conclusion I find each of the accused person guilty and do stand convicted for their joint common intention and unlawful acts of causing the death of the deceased. It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 14TH DAY OF JUNE, 2021.

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R NYAKUNDI

JUDGE

In the presence of

Mr Mouko Advocate for the Accused

Accused persons present

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