REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL CASE NO. 17 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

DANIEL CHARO KATANA.....ACCUSED

Coram: Hon. Justice R. Nyaku

Mr. Mwangi for the state

Mr. Muranje for the accused persons

J U D G M E N T

The accused was charged of murder contrary to Section 203 and 204 of the Penal Code. The brief particulars being that on 4.9.2016 at Ngerenya Mkombe, Kilifi County, he murdered **Hamisi Charo Katana**.

The prosecution case was based on the evidence of the following witnesses. **(PW1) – Peter Katana** a village elder of the aforesaid sub-location a brother to **Mary Kitsao** and a cousin to the deceased testified that on 24.9.2016 they had organized a family gathering in which **Mary** was to introduce her fiancé. It was further the version of **(PW1)** that after the rituals pertaining to the ceremony were done, some of the visitors left at their pleasure. He however recalled escorting some of them including the deceased where they parted ways to their respective homes. It did not take long before **(PW1)** would hear screams from the home of the deceased. When he placed a telephone call to find what was happening no one answered to that effect. All that anxiety ended up with tragic news that the deceased had been killed. He visited the scene together with other members of the neighbourhood. On arrival they confirmed that the deceased had suffered fatal injuries to the head thereafter the incident was reported to the police to take further action.

The next witness **Furaha Katana (PW2)** the wife to the deceased testified that on 24.9.2016 at about 8.00 p.m. he heard screams of some people quarreling behind their house. She recognized the voice to be of her husband the deceased and one Daniel saying *"Daniel please do not kill me." "With a reply I will kill you because you refused to leave the land."* She therefore sought the company of **Kahinda** so that they could visit the scene to verify the outcome of that quarrel as the noise went silent. That is when they were confronted with the serious injuries suffered by the deceased. The suspect was nowhere to be seen. The report had to be made to the security agencies accompanied with raising an alarm for the neighbours to know of the incident. **(PW2)** further testified that police came to the home to collect the body followed with the recording of witnesses statements.

Next was the testimony of **(PW3) Augustus Keithi** which gave the surrounding circumstances involving the killing of the deceased. **(PW3)** testimony touched on the background information involving a land dispute between the deceased and the accused person dating way back in 2015. In one of those incidents, **(PW3)** told the Court that the deceased complained that he had been receiving threats to kill from the accused person. However, in 2016, he was to be awakened by screams from the deceased home that he had been killed. On arrival at the scene he found the deceased to have been cut into pieces.

The other evidence outlined by the prosecution was that of **(PW4) Said,** a clan elder. In his recollection on 24.9.2016, he was in the company of the deceased, and one- **Peter,** in which they were to slaughter a goat together on that material day. However, left shortly leaving the deceased and **Peter** to continue with the assignment. On return **(PW4)** testified that he socialized with the deceased, other invited guests up to 800 plus. He also recollected that prior to that day, the accused and the deceased had been harboring some differences on account of witchcraft. It happened that on 24.9.2016, the deceased was attacked and did suffer fatal injuries.

(PW5) the prosecution further summoned the evidence of **PC Wafula** who testified as to the nature of investigations carried out to which led to the indictment of the accused. He also produced a post-mortem examination report done so with the consent of the defence as an exhibit in support of the death of the deceased.

At the close of the prosecution case, accused person was called upon to answer the charge in terms of Section 306 (2) and 307 of the Criminal Procedure Code.

The accused elected to give a sworn statement of defence in which he denied the act of killing as alleged by the prosecution witnesses. He denied being at the scene namely within the homestead of the deceased. In addition, the accused also called in the evidence of **(DW2) – Charo Peter** who also testified that the report on the deceased death was received on the material day but the accused seemed not to be involved. Given this exposition, its now my singular duty to make a specific finding in regard to the death of the deceased.

Resolution

The gravamen of the prosecution case was that the deceased death was unlawful actuated with malice aforethought of the accused person. I now purpose to address the issues in the following model

(1). Whether the prosecution discharged the burden of proof of beyond reasonable doubt against the accused person to secure a conviction for the offence of murder contrary to Section 203 of the Penal Code.

Refocusing on the burden of proof, of beyond reasonable doubt in the entire history of our country its vested with the state. It is a constitutional imperative under Article 50 (2) (a) that the deceased has a right to presumption of innocence until the contrary is proven beyond reasonable doubt. The firmly settled standard of proof is never abandoned to shift to the accused person at any one given time. This approach to the burden of proof in criminal cases is appropriately clarified in the case of **Woolmington v DPP {1935} AC 462, Mkendeshwo v R {2002} 1KLR 461, Miller v Minister of Pensions {1947} 2 ALL ER 372 at 373** using analytical tools developed by jurists and linguists the expression proof of beyond reasonable doubt fosters the intensity of belief, the degree to which a fact finder of an independent tribunal is convinced that a given act actually occurred, in the correctness of his or her factual conclusions beyond reasonable doubt.

This phrase or legal doctrinal concept is derived from what **Learned Author William Blackstones' Famous Maxim** to wit ***" it is better than ten guilty persons escape, than that one innocent suffer."*** **(See Reprint {1978} 9th Edition 1783).**

It is therefore trite that the state should prove its case so strongly that the evidence leaves the trial Court with the highest degree of certitude based on such evidence. It is to be noted that the concept of reasonable doubt in our criminal justice system is not based upon a sympathy or a whim or prejudice or caprice or sentimentality, jelly fish of a Judge or Magistrate seeking to convict or acquit another human being of the commission of the offence. It is an approach to hold the state to the highest standard of discharging its burden of proof in criminal cases beyond reasonable doubt. It is not a conjecture or a fanciful doubt. It is based on admissible and material evidence to dissuade the trial Court from acquitting an accused person.

Focusing on the strength of the prosecution case goes hand in hand with the evidence tendered in the instant case to discharge that burden of proof beyond a reasonable doubt. It is therefore instructive to remind myself what the empirical evidence enquiry prosecution put in place to discharge the standard of proof in the perspective for the offence of murder against the accused to secure a conviction.

In murder cases contrary to Section 203 of the Penal Code, the state through the prosecution agency is responsible to produce witnesses or other evidence to proof the following elements beyond reasonable doubt:

(a). The death of the deceased.

(b). That the death was unlawfully caused.

(c). That in that death the perpetrators were actuated with malice aforethought.

(d). That the accused person in Court was the one who committed the offence.

Given the unequivocal terms of the evidence, indeed the prosecution case is purely circumstantial, such stratagems can be reflected in the testimonies of the key witnesses. It is significant that we deal with that question on the elements of circumstantial evidence within which a conviction can be secured. On account of this, I refer to the well established principles on this evidential branch of Law. In **Sawe v R {2003} eKLR** the Court had this to say:

> ***"In order to justify reliance on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weathering the chain of circumstances relied upon. The burden of proving facts that justify the drawing of an inference from the facts to the execution of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused."*** **(See also Rex v Kipkereng Arap Koskei & 2 others {1949} EACA 135).**

It would appear in circumstantial evidence the threshold issue is as expounded in the case of **Omar Mzungu Chimera v R CR Appeal No. 56 of 1998**. Here the Court of Appeal stated interalia as follows:

> ***"It is settled Law that when a case rests on entirely circumstantial evidence, such evidence must satisfy three tests. (1). The circumstances from which an inference of guilty is to be drawn, must be cogently and firmly established. (2). Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused. (3). The circumstances taken***

cumulatively should form a chain so complete that there is no escape from the conclusions that within all human probability, the crime was committed by the accused and none else."

From this dicta, the Law draws no distinction between circumstantial evidence and direct evidence in terms of weight or importance to proof existence of a fact in issue to secure Judgment in favor of the accused person pursuant to Section 107 (1) of the Evidence Act. The only distinction I can think of is that of manifestation of an inference before a Court can return a verdict of guilty based solely on circumstantial evidence.

In a classical difference in direct evidence, the witness watches or sees an accused person assault or commit the unlawful in a fight or theft etc. But that is contrasted with the evidence of witness who witnesses the accused carry the item of theft or escape from the scene of the crime. Notwithstanding, that seminal difference, the general view is that both direct and circumstantial evidence are of equal weight and significance to prove the guilt or innocence of an accused person.

In the instant case, it's precisely clear that the deceased **Hamisi Charo** was killed on 24.9.2016 at Ngerenya Mkombe village. On this the prosecution adduced evidence of **(PW1), (PW2)** and that of the postmortem examination report. There is no dispute that the deceased is dead.

On whether the deceased death was unlawful, the propensity evidence by **(PW2) Furaha**, the wife to the deceased sets the tone on the surrounding circumstances in which the deceased met his death. In the context of her testimony, a fight broke behind their house involving the deceased and one **Daniel.** In the initial stages, there was a quarrel, which escalated to an attack. In her evidence the prompt of an assault was due to the brief envisage to the effect Daniel please, *"don't kill me with a quick response from the assailant I will kill you."* A few hours thereafter, a visit to the scene by **(PW1), (PW3), (PW4)** and **(PW5)** showed a victim of murder with multiple injuries to the head. From the observations made effectively, the deceased had passed on as a result of the serious injury inflicted by the assailant. The post-mortem examination report provides the extent to which injuries suffered are instructive to find as a fact on circumstantial evidence of the death being unlawfully caused beyond reasonable doubt.

It follows from what I have said to rule on the element of malice aforethought to accept whether this offence as committed was murder or alternative homicide of manslaughter.

It is a primary fact that the essential features in malice aforethought are as defined under Section 206 of the Penal Code.

"Whether or not the Court is to be satisfied that a particular fact on murder has been proved beyond reasonable doubt, the combination of facts under these provisions must be inferred in favor of the prosecution. It will generally be sufficient for the prosecution to proof the guilt of the accused and existence of malice aforethought by showing an intention to cause the death of another human being. An intention to cause or to do grievous harm, knowledge that the act or omission of causing death will probably cause the death or grievous harm to some other person actually killed or not…."

In the instant case, the strands of circumstantial evidence to strengthen the prosecution case on malice aforethought came from **(PW1), (PW2), (PW3), (PW4), (PW4)** and medical evidence on the post-mortem examination report produced in Court by **(PW5).**

In this case, the ray of light sufficient to converge and bear credence to illuminate the pathway on circumstantial evidence came from the wife of the deceased herein **(PW2).** The piece of information which is particularly damming like a piece of cord in the chain to make a strong case for the prosecution is on the communication of the quarrel, thereafter which was escalated to a full blown fight. The strands in her evidence are that a voice of her husband in a distress condition uttered the following words, *"Daniel don't kill me…."* In response, the well-known voice of Daniel answered back *"I will kill you."* The yelling voice of the two men well known to the witness prior to the murder incident remains unimpeachable. The particulars of evidence which accompany **(PW2)** testimony as things stand include the evidence of **(PW1)** on the deceased attending the reception of one Mary who was set to introduce her fiancé. In the course of the ceremony, information trickled in that the deceased had been killed. According to **(PW1),** some central fact of connecting the accused with the death of the deceased was in respect of threats and making reference to witchcraft by the deceased against his children.

The other type of circumstantial evidence came from **(PW3)** which I believe to be a truer representation of the conduct of the accused prior to the fateful day of hacking the deceased to death. That peculiar aspect involved a continuum of threats against the deceased on allegations of witchcraft. It did not take-long before the deceased was attacked and killed subsequent to those threats.

The other probative value inconsistent with innocence of the accused came from the post-mortem examination report admitted as exhibit 2 on behalf to the pathologist by **(PW5).** The explanatory notes in the report in connection with the injuries suffered by the deceased is a strand of circumstantial evidence which corroborates **(PW2)** statement on oath on how the deceased met his death. There is nothing left upon which this Court cannot lay a reasonable belief that the deceased death was unlawful and actuated with malice aforethought. There is enough evidence shown to convince the Court of existence of malice aforethought in line with the principles in **Tubere s/o Ochen v R {1945} 12 EACA 63, R v Enock Achula {1941} 1 EACA 63, Ernest Abang alias Onyango v R CR Appeal No. 32 of 1990.** The circumstances surrounding and connected with the death of the deceased are far too numerous and continually rise to a valuable source of circumstances to infer malice aforethought beyond reasonable doubt.

Although, motive is not an essential element of the crime of death, its worthy to note that briefly the deceased was killed in an endeavor to silence him or revenge attack on mistaken belief that he had bewitched the children of the accused. The statement of belief manifested in the evidence of **(PW1), (PW3)** and **(PW4)** respectively. The additional evidence from **(PW2),** that the accused killed the deceased because of occupation on a particular parcel of Land was secondary to the primary motive on witchcraft. The accused immediate response in answer to the charge never dislodged the circumstantial evidence.

On identification, the principles in **Anjononi & others v R {1976-1980} 1KLR 1566** provide the baseline factors of identifying voices of

another human being. They include memory for voices, long exposure which produce better recollection up to a point of positive identification. People are better at remembering voices that they heard alive rather than on tape or over the telephone. The seminal case in both **(PW2)** as eye-witness and ear-witness voice identification of the accused was the opportunity she had to hear the words to the effect of hearing the voice of the deceased *"Daniel don't kill me"*. In return, the accused answered *"I will kill you because you refused to leave the land."* On concentrating this aspect of the witness testimony it establishes a framework for evaluating the positive aspects of identification of the accused person. There is no likelihood of misidentification which violates the accused right to due process as both the victim and the accused were well known to **(PW2).** She had interacted with them for a long period of time. One as the spouse and the accused as a direct relative to the family. Using these criteria, I hold and find that **(PW2)** identification of the accused as the assailant was good enough to pass muster that identification was never corrupted just for the reason that there was no identification parade. In my view, if the identification is reliable, then it should be accepted by the Court notwithstanding any alternative process that may exist to confirm identification of a culprit. Again, in the instant case, true to the evaluation **(PW2)** had ample opportunity to listen to the accused and deceased voice during the attack.

In essence, the facts of this case both the prosecution version and the accused hypothesis to exonerate himself from the indictment, I concede that the twin objectives of truth and justice takes precedent over the shortfalls of the defence case. As for the prosecution, a finding of guilt for the offence of murder contrary to Section 203 against the accused is hereby entered followed with a conviction based on circumstantial evidence that rejects the innocence of the accused. That evidence shows, the accused's guilt is beyond reasonable doubt with no ambiguity compatible with subsets of the total evidence of the prosecution narrative.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 20TH DAY OF SEPTEMBER 2021

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R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Mwangi for the state

2. The Accused Person