



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL CASE NO. 16 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

ALI KAJOTO ALI ACCUSED

Coram: Hon. Justice R. Nyakundi

Mr. Mwangi for the state

Mr. Ogeto advocate for the accused person

J U D G M E N T

The accused person before Court **Ali Kajoto Ali** was indicted with the offence of murder contrary to Section 203 and 204 of the Penal Code. In brief the prosecution alleged that on 26.10.2012, at Upendo village, the accused murdered **Charo Kazungu Karisa Nguyo**. The motive of the killing was alleged to be of being suspected to practice witchcraft. The accused who pleaded not guilty was represented at the trial by Learned counsel **Mr. Ogeto** whilst the prosecution case was initiated by **Ms. Sombo**, prosecution counsel and thereafter finalized by **Mr. Mwangi**, also a prosecution counsel. The case for the prosecution was based on the evidence of the five (5) witnesses whose brief summary is herein stated as follows:

(PW1) – Ngumbao Kazungu on oath informed the Court that on 26.10.2012 the deceased had taken the cows to the fields at the back of the homestead. The accused emerged and started chasing the deceased while armed with a stick hitting him on the head. Further, **(PW1)** testified that the accused did not stop there but also used a bow and an arrow to inflict harm on the stomach. It was the testimony of **(PW1)** that all efforts of intervening were met with threats of violence from the accused person. On cross-examination by the defence counsel the witness told the Court that he saw the accused use a stick, an arrow and a bow to inflict bodily harm against the deceased. Following that attack **(PW1)** confirmed to the Court that the deceased died on the spot.

(PW2) – Sidi Katana, the wife to the deceased brother testified that on 26.10.2012, the deceased brought some cows to be textures within the compound. According to **(PW2)**, the accused emerged armed with a stick, an arrow and a bow which he targeted at the deceased on the head and the stomach respectively. She was able to see the deceased hit on the head three times with that piece of wood and a shot at the stomach. **(PW2)** was categorical that on checking the deceased, he had passed on immediately.

(PW3) – Philip Kadenge testified and identified himself as a pastor and a businessman. In his testimony **(PW3)** recalled the events of 17.3.2015 with regard to a meeting called of about thirty (30) people to deliberate on the issue of several deaths in Mulango village. In the meeting it was alleged that the key suspect of those murders was the accused. However, the accused though called upon to defend himself produced no defence. That issue was left in the hands of the Chief.

(PW4) – Charo Kazungu testified and also alluded to a security meeting called by the Assistant Chief to deliberate on the issue of the killings which had been place within the village. That is the meeting in which the accused was mentioned as a suspect. **(PW4)** further told the Court that on 15.3.2015 that the accused went to his kiosk and in the ensuing conversations he referred to those deaths as the one responsible. To give credence to that evidence of **(PW4)** since the arrest of the accused no one has been killed in the area.

(PW5) – Tabu Karisa the wife of the deceased testified to the effect that after attending a burial ceremony accused informed the deceased that he will be visiting them at their home. The witness **(PW5)** became suspicious of that request by the accused. She therefore decided to inform the Assistant Chief. Before that matter could be resolved within two-three months the deceased was killed.

(PW6) – PC Peter Odhiambo was the investigating officer. He told the Court how he the lead investigating officer went about the matter culminating in the arrest and indictment of the accused. The accused person was placed on his defence. He denied any wrong doing not even the alleged killing of the deceased.

Analysis and Determination

In determining the case against the accused person, I bear in mind that the prosecution has a duty to prove beyond reasonable doubt the following ingredients:

- (1). *The death of the deceased.*
- (2). *The death was unlawfully caused.*
- (3). *The death besides being unlawful, it was committed with malice aforethought.*
- (4). *That the accused person and no one else caused the death of the deceased.*

That canon of beyond reasonable is indispensable for the reason that an accused person right to presumption of innocence is guaranteed under Article 50 (2) (a) of the Constitution. That burden of proof is well settled. That the state bears the task and responsibility at all times. It never shifts to the accused or the defence for that matter see the principles in **Woolmington v DPP {1935} AC 462 and Miller v Minister of Pensions {1942} AC**. The Supreme Court of Nigeria in **Bakare v State {1985} 2 NWLR** stated as follows:

“Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability.”

To give meaning to this concept of burden of proof in the case at bar one has only to look at the facts, evidence in support of the ingredients contrary to Section 203 of the Penal Code. The prosecution relied on the evidence of the six witnesses to secure Judgment against the accused person. First, the fact of death is not disputed. There is the evidence of (PW1), (PW2) and **the postmortem examination report dated 2.11.2012 as exhibit 2**. The defence does not dispute the death of the deceased. Secondly, in a murder charge there is the ingredient of the death being unlawfully caused. As the principle in the case of **R v Guzambizi s/o Wesonga {1948} 15 EACA 65** articulates that:

“every homicide is deemed to be unlawful unless it is excusable or justified in Law, or in reasonable defence of self or property.”

From this definition, evidence tendered by these prosecution witnesses (PW3) and (PW4) seemed to point to an allegation of witchcraft as the reason why the deceased was killed by the accused. In our jurisdiction, the Law is crystal clear that witchcraft cannot be a reasonable mistake under which an accused person can be excused in committing the murder. In considering the facts of the case, the prosecution sufficiently demonstrated in the evidence of (PW1) and (PW2) that the accused chased the deceased while armed with a piece of wood, an arrow and a bow. When he finally caught up with him, he used the piece of wood to inflict injuries to the head and an arrow targeting the stomach. The evidence by the doctor who performed the post-mortem examination, indicated multiple deep cuts to the head and an arrow wound to the left of the hip. The grievous harm opined the doctor in the report that the cause of the death was severe head injury. With regard to this ingredient, the prosecution has discharged the burden of proof of the death being unlawful.

Thirdly, to determine whether the death was executed with malice aforethought appropriate consideration comes from the interpretation and application of Section 206 of the Penal Code. The Section 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. The formulation of the Law on manifestation of malice aforethought is as illustrated in **Tubere s/o Ochen {1945} 12 EACA 63**. 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**). That sometimes there is no qualitative distinction between anger, hatred and malice aforethought is exemplified from the quotes made by the Chief Justices of Massachusetts and Connecticut in the language of **Massachusetts C. J** he stated thus:

“Malice in this definition is used in a technical sense including not only anger, hatred and revenge, but every other unlawful and unjustifiable motive. It is not confined to ill-will toward one or more individuals, but is intended to denote an action flowing from any wicked and corrupt motive, a thing done malo animo, where the fact has been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty and fatally bent on mischief, and therefore malice is implied from any deliberate or cruel act against another, however sudden. Murder is the voluntary killing of any person of malice prepense or aforethought, either express or implied by law; the sense of which word malice is not only confined to a particular ill-will to the deceased, but is intended to denote, as Mr. Justice Foster expresses it, an action flowing from a wicked and corrupt motive, a thing done malo animo, where the fact has been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty and fatally bent on mischief.”

Similarly, the Connecticut C. J. followed the queue and approached the definition to wit:

“In common speech malice usually means hatred, ill-will, malevolence or animosity, existing in the mind of the accused, but in the law of homicide its meaning is much wider. Malice, as the word is used in an indictment for murder, not only includes cases where the homicide proceeds from or is accompanied by a feeling of hatred, ill-will or revenge existing in the mind of the slayer towards the person slain, but also cases of unlawful homicide which don't proceed from and are not accompanied by any such feeling. In the law of homicide, if a man intends unlawfully to kill another or do him some grievous bodily harm, such intention, whether accompanied or not accompanied by a feeling of hatred, ill-will or animosity, constitutes malice. * * * Suppose A,

intending to kill B, whom he hates, by mistake kills C, his friend, whom he loves; here he did not intend to kill his friend, and he did not hate him, but he loved him; and yet the law says he killed his friend with malice.”

From the above passages, the evidence by the prosecution must illuminate beyond reasonable doubt the relationship between the death of the deceased and proof of malice aforethought. There is no basis to assume that every killing of another human being constitutes malice aforethought on the part of the accused person. By the position of the Law, the evidence and the depositions of witnesses must provide a *prima facie case* pointing to the accused culpability that in causing death he or she was motivated with malice aforethought. Does it matter? Yes, malice aforethought belies the distinction between aggravated murder contrary to Section 203 of the Penal Code and manslaughter under Section 202 of the said Code. Since statement made to the police constitute the most important evidence in criminal detection, it is necessary that in answering any question as to malice aforethought applicable to a specific case the incriminating features must relate thereto establishing this element to bring the case within the above provisions.

In the instant case, evidence of **(PW1)** and **(PW2)** established that the accused armed himself with a piece of wood, manipulated to inflict serious injury to the head. In addition, the accused was in possession of an arrow and a bow which he used to shoot the deceased at the hip and stomach. Those injuries from the pathologist opinion caused the death of the deceased. The prosecution evidence tendered satisfies the criteria indicative of malice aforethought on the part of the accused.

Finally, on the issue of identification, I am guided by the principles in **R v Turnbull {1976} 3 ALL ER 549** and the case of **Anjononi v R {1980} KLR 59**. The prosecution evidence on identification comes from **(PW1)** and **(PW2)**. As deducible from their testaments the nature and intensity of the surrounding circumstances were clear as to the unlawful act committed by the accused in broad daylight. The defence failed to controvert the evidence on identification which squarely placed him at the scene of the murder. This was an accused positively identified by the prosecution witnesses free from error or mistake to that effect. The brief defence evidence by the accused remained to be a mere statement with no probative value to create a reasonable doubt in the mind of the Court to absolve him of the crime.

In this case, it's my view that the prosecution has discharged the burden of proof of beyond reasonable doubt for the offence of murder contrary to Section 203 of the Penal Code against the accused person. Admittedly, that calls for the accused person to be found guilty and convicted of the offence as per the Law established. Therefore, the matter shall proceed for sentencing in accordance with the guidelines laid down in **Francis K. Muruatetu v R {2017} eKLR**.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 15TH DAY OF SEPTEMBER 2021

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R. NYAKUNDI

JUDGE

In the presence of:

1. The accused person
2. Mr. Mwangi for DPP