



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CRIMINAL CASE NO. 8 OF 2018**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**YUSUF CHIVATSI MURANGA.....1<sup>ST</sup> ACCUSED**

**SIMON MWACHIRO BADI.....2<sup>ND</sup> ACCUSED**

**CHARLES NGALA MUNDU alias BEJA.....3<sup>RD</sup> ACCUSED**

**Coram: Hon. Justice R. Nyakundi**

**Mr. Mwangi for the state**

**Ms. Ruttoh advocate for the accused persons**

**J U D G M E N T**

The three accused persons namely, **Yusuf Chivatsi Muranga, Simon Mwachiro Badi** and **Charles Ngala Mundu alias Beja** were charged with the offence of murder contrary to Section 203 and 204 of the Penal Code. The brief particulars being that on 11.6.2018, at Malaga Sub-Location, the accused persons jointly murdered **Ali Shariff**. Each of the accused person pleaded not guilty. Pursuant to Article 50 (2) (H) of the Constitution **Ms. Ruttoh** was appointed to represent the accused persons at the trial as the state case was led by **Mr. Mwangi**.

**The Prosecution Case**

The prosecution case was that on 11.6.2018, the deceased was at home in company of his wife **Ruwa (PW2)** when assailants entered on or about 7.00 p.m. That day **(PW2)** testified that the assailants whom she was able to identify from the light of torches as the accused persons attacked the deceased using pangas. As a result he sustained physical bodily harm.

In the testimony by **(PW1)**, he received information on the attack from **(PW2)**. Acting on that report **(PW1)** visited the scene where he came into contact with the deceased who appeared to be in great pain due to the gravity of the injuries. The brief inquiry he had with the deceased according to **(PW1)**, reiterated that the known assailants were the accused persons before Court. That information on identification of the accused persons helped to hold them accountable for the crime.

**(PW3) – Charo Kalama**, a neighbor to the deceased testified that while in his house he had screams from the deceased house. That distress call prompted him to make a visit where he encountered with the deceased who had sustained multiple injuries. He also observed that the deceased wife had been assaulted by the same attackers inflicting bodily harm. It was then decided for both victims to be escorted to the hospital at Malindi for examination and treatment. According to **(PW3)**, the deceased succumbed to death in the course of treatment.

The fourth witness Peterson Safari **(PW4)** told the Court that on the material day, he was telephoned by some people to go to the home by the deceased to assist in escorting him to Malindi hospital. That is how he drove his pick up which he used to have him taken to the hospital but was later to learn that he passed on while receiving treatment.

**(PW5) No. 23568 IP Getende**, testified on how he conducted investigations in regard to the death of the deceased. According to **(PW5)** the evidence gathered from the witnesses showed that the accused persons while armed with pangas inflicted the fatal injuries. The photographs of the scene were also taken and in the same period a postmortem examination report was carried out to establish the cause of death. Given that position, the exhibits recovered and documentary evidence were all produced as exhibits in support of the charge.

**(PW6) – Cpl Boniface Kipkoech**, at the time attached to Watamu Police Station effected an arrest upon the suspects who included one **Yusuf Chivatsi**, the 1<sup>st</sup> accused. **(PW6)**, also did visit the mortuary to witness the postmortem examination in company of **(PW5) IP Getende**.

The first accused **Yusuf Chivatsi Muranga**, gave unsworn statement and denied any involvement with the crime of killing the deceased. **Mr. Yusuf** stated that he also heard screams from the neighbourhood which apparently had something to do with the deceased attack and subsequent death.

**(DW2) – Mr. Simon Mwachiro Badi**, also, the co-accused elected to give unsworn evidence in which he denied the charge. He was emphatic that he knows little on how the deceased met his death.

**(DW3) – Mr. Charles Ngala Mundu** following through with other accused persons denied any allegation implicating him with the offence.

## **Resolution**

Having re-appraised the prosecution and defence case, the issues before the Court are: Whether the prosecution has discharged the burden of proof of beyond reasonable doubt against each of the accused persons to secure a conviction for the offence of murder contrary to Section 203 of the Penal Code.

In addition to the above issue the following ingredients stand out as areas to be covered by the prosecution for a verdict of guilty to be entered against the accused persons:

- (a). The death of the deceased.**
- (b). That the death was unlawfully caused.**
- (c). That the causing death, the accused were motivated with malice aforethought.**
- (d). That the accused persons besides malice aforethought formed a common intention to prosecute the crime.**
- (e). That evidence by the prosecution positively identifies the accused persons as the perpetrators of the crime.**

In assessing of the burden of proof, it is best to start with acknowledging the well established test laid down in **Woolmington v DPP {1935} AC 462** and **Miller v Minister of Pensions {1942} ALL ER**. The legal conceptual framework in **Woolmington** assists as follows:

**“Why the standard of proof of beyond reasonable doubt? This criminal device is consistent with the right on presumption of innocence under Article 50 (2) (a) of the Constitution.”**

It follows therefore that the presumption of innocence being of a constitutional dimension comes with the foundation of the administration of Criminal Law in our country. It is a fact that the constitutional stature of the reasonable doubt standard we explicitly hold that the due process right to a fair hearing under Article 50 protect the accused against conviction except upon proof of beyond a reasonable doubt of every element of the offence.

What however I find more perplexing while navigating the landscape of judicial reasoning and decision making the term beyond reasonable doubt is just difficult enough to comprehend, as a canon of construction and interpretation in Criminal Law adjudication. To gain a breakthrough in this everyday behavioral pattern of decision making standards sometimes is an onerous task. In assessing the threshold issue an accused person in a criminal prosecution must be acquitted if his or her guilty is not proven beyond reasonable doubt. The presumption of innocence until the contrary is proved under Article 50 (2) (a) of the Constitution is not overcome by a probability that the accused committed a crime. Before a Court can impose criminal punishment for an offence, it must first overcome this presumption by establishing that the prosecution has proved the charge beyond a reasonable doubt of every fact making up the great of an accused person. That context placed in the direct and indirect evidence of the prosecution case reveals the following thus:

### **(a). The death of the deceased.**

The basic rule is that death is usually proved by way of medical evidence, being a postmortem report. In the instant case, the prosecution evidence on this element flows from the testimony of **(PW1)**, **(PW2)** and further the postmortem report on the body of the deceased. There is no dispute from either side of the trial that the deceased **Ali Shariff** is dead.

### **(b). The death was unlawfully caused**

The right to life is protected under Article 26 of the Constitution. It is the Law in Kenya that a person shall not be deprived of life intentionally, except to the extent authorized by this Constitution or other written Law. As a consequence, there is a presumption in Law that any killing of another human being is unlawful unless there is rebuttal evidence of it having occurred naturally, accidentally or under the rubric of excusable self-defence or property. (See **Guzambizi s/o Wesonga v R {1948} 15 EACA 65**).

In the instant case from the evidence of **(PW1)**, **(PW2)** and **(PW3)** the deceased was assaulted fatally at his homestead on 11.6.2018 at about 7.00 p.m. **(PW1)** and **(PW3)** testified that when they went to the scene following some screams, they found the deceased to have suffered

multiple injuries. They made arrangements to have him taken to the hospital. It was at that medical facility, the deceased succumbed to death. The postmortem examination report by Dr. **Angore** showed that the deceased sustained deep penetrating wounds to the head and temporal lobe exposing brain matter. In the circumstances, it was opined that the deceased death was as a result of severe deep cut wounds to the head secondary to multiple injuries to the body. Through this evidence the level of unlawful force employed was that meant to do grievous harm. The deadly force undertaken by the assailants will only be available and used against another human being with an intention to unlawfully inflict serious harm which endangers the well-being of another human being. In that regard the deceased death which flows from the injuries was unlawfully caused.

**(c). Whether the unlawful acts of omission was actuated with malice aforethought**

Malice aforethought is defined under Section 206 of the Penal Code as either an intention to cause death of another human being or to do grievous harm. From the record, it is clear that **(PW1)**, **(PW2)** and **(PW3)** testimonies denote that the accused persons arrived at the homestead of the deceased. That they only were armed with dangerous weapons identified as pangas. The deceased was there assaulted sustaining serious bodily harm. Thereafter the deceased was escorted to the hospital by **(PW4)** in his motor vehicle. As the deceased had suffered serious injuries, he passed on without his health being restored to his original condition. It is trite that malice aforethought can be inferred from the circumstantial evidence which demonstrates the nature of injuries, the type of weapons, the body parts targeted by the assailants, the conduct of 1<sup>st</sup> perpetrator, before, during or after the commission of the crime.

This reasoning so far as more expansive but completely compatible with the Courts decision in **R v Tubere s/o Ochen {1945} 12 EACA 63, Akol Patrick & Others v Uganda {2006} HCB Vol. 1 6**. Once it has been established by the prosecution that the killing was done with malice aforethought then the burden shifts to the accused persons to show that the unlawful acts were within the permissible limbs to the extent authorized by the Constitution or other written Law.

In my view, the prosecution evidence including the postmortem report is clear and does satisfy that the death of the deceased was actuated with malice aforethought. This is a *prima facie* case made out of malice aforethought but the evidence by the defence failed to contradict that was excusable or justified the extent provided within our systems of Laws. In this respect, the deceased death was unlawful coupled with malice aforethought.

Further invoking the guidelines in **R v Turnbull & Another {1977} QB 224** its acknowledged that the identification of the first accused by an identification parade positively placed him at the scene following **(PW2)** pointers that he was among the assailants who killed the deceased. This position was further confirmed by the testimony of **(PW1) Karisa Karu** who on visiting the scene found the deceased conscious but with multiple injuries. Albeit in these circumstances, the deceased told **(PW1)** that he had first been assaulted by the three accused persons in the dock. Pausing here, it is to be observed that a man will not meet his maker with a lie in his mouth. (See **P v Radhakrishna v State AIR {1989} SC of Kamataka**).

The principles on admissibility of the evidence of a dying declaration are well illustrated in **R v Andrew {1987} AC 281** where the Lord **Ackner** stated as follows:

**“(1). Can the possibility of concoction or distortion be disregarded.**

**(2). To answer, this ask if the event was so unusual starting or dramatic that it donated the thought of the victim causing an instructive reaction without the chance of reasoned reflection, on condition of approximate but not necessary exact contemporaneity. To be sufficient spontaneous the statement must be closely connected with the event causing it. There must be no specific features making concoction or distortion wisely. There must be no special features likely to result in error for example drunkenness.”**

In assessing the test of a dying declaration, it's crucial to take into account the provisions of Section 33 (a) of the Evidence Act. In the circumstances such as these explained by **(PW1)**, the only question for the Court to ask is whether the evidence stated is within the principles in **Philip Nzaka v R {2016} EKLR**. The Court held that:

**“Under Section 33 (a) of the Evidence Act, a dying declaration is admissible as an exception to the rule against admissibility of hearsay evidence. Under that provision, statements of admissible facts, oral, or written, made by a person who is dead are admissible where the case of death is in question and those statements were made by him as to cause of his death or as to any of the circumstances of the transactions leading to his death. Such statements are admissible whether the person who made them was or was not expecting death, when he made the statements...”**

In the instant case, the picture painted by **(PW1)**, on the dying declaration given in the form of an answer to the inquiry made on the cause of the injuries is admissible. In other words the statement by the deceased pointed to the accused persons whom he referred by their respective names as the assailants. Therefore, the brain could of the dying declaration was that of the deceased. The Court in **Paniben v State of Gujarat** held that:

**“There is neither rule of Law nor province that dying declaration cannot be acted upon without corroboration (Munnu Raja v State of M. PC {1976} 3 SCC 104) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it without corroboration.**

In looking at the evidence on this aspect, I construe that in light of the decisions, the dying declaration is admissible to positively identify the accused persons as the perpetrators of the murder. Finally, it is beyond debate that the defence failed to controvert the prosecution evidence on causation, and participation of the accused persons in the murder of the deceased. The result is that acting on that evidence, I am satisfied the standard of proof of beyond reasonable doubt has been discharged against each of the accused person to enter a verdict of guilty for the

offence of murder contrary to Section 203 of the Penal Code.

As a consequence, they stand convicted and their defence found wanting and a mere sham to rise to the level of a doubt which could be resolved in their favor to benefit from an acquittal.

It is so ordered.

**DATED, SIGNED ON 15<sup>TH</sup> DAY OF SEPT 2021 AND DISPATCHED VIA EMAIL ON 15<sup>TH</sup> DAY OF SEPTEMBER 2021**

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**R. NYAKUNDI**

**JUDGE**

**In the presence of:**

1. Mr. Mwangi for DPP
2. The Accused Person