



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL CASE NO. 8 OF 2018

REPUBLIC..... PROSECUTOR

VERSUS

ZAKAYO ECHUKU BARASA..... ACCUSED

JUDGMENT

1. Zakayo Echuku Barasa is charged with an offence of murder contrary to section 203 as read with section 204 of the Penal Code.
2. The particulars of the offence are that on the 3rd day of June 2018, at Aloete village, Teso North Sub County of Busia County, jointly with another not before court murdered Sammy Nicodemus Papa.
3. The prosecution contended that the accused and one Iyese beat the deceased herein for they wanted him to leave the home on allegations that he was not born there.
4. The accused denied any involvement in beating the deceased. He contended that he was called to the scene by the area assistant chief who requested him to call another boda-boda and take the deceased and his brother Iyese to hospital.
5. The issues for determination are:
 - a) Whether the accused was involved in beating the deceased; and
 - b) Whether the offence of murder was established against any of the accused.
6. Kamela Ikapesi Echuku (PW1) is a village elder at Aloete village. He testified that at about 6 a.m. on 25th April 2016, he heard Susan Andionyi Anyaa (PW2) screaming. When he went to the scene, he found the deceased being beaten by the accused and Iyese. When he intervened, the accused became wild. He therefore telephoned the area assistant chief and reported the incident. When the assistant chief arrived, the accused and Iyese ran away.
7. Susan Andionyi Anyaa (PW2) in her evidence said the incident was at about 6 a.m. When she was attracted to the home of Omito, the brother of the deceased, she found the accused and Iyese beating the deceased. Zakayo chased her away and she screamed loudly. Ikapesi went to the scene in response to her screams. She then proceeded to Moding Police Patrol Base to report.
8. The defence of the accused was that at about 7a.m. the assistant chief of the area called him on the phone and wanted him to go and assist the deceased and his brother Iyese to Moding Police Patrol Base. He went to the scene and found the duo having fought. He called a second motor cycle. The deceased was taken to Moding Health Centre while Iyese was taken to Moding Police Patrol Base.
9. The evidence of Hellen Atwana Ikapian (DW2) is that she went to the scene at about 8.30 a.m. and found the deceased and Iyese fighting. The accused was not at the scene. He only went there after the area assistant chief had summoned him.
10. Obadiah Osukuku Ong'oro (DW3) went to the scene at about 7 a.m. and found the deceased and Iyese having fought. The evidence of Francis Karani Bosa (DW3) and that of Gad Iluku Olola (DW5) the area assistant chief was to the same effect. He added that they found Susan Andionyi Anyaa (PW2) at Moding Police Patrol base.
11. These are two competing versions of the same incident. The version by the prosecution is believable due to the following reasons:
 - a) Susan Andionyi Anyaa (PW2) was the first to arrive at the scene. She testified that after raising an alarm that attracted Kamela Ikapesi (PW1) to the scene, she went to Moding Police Patrol base to report.

b) Susan Andionyi Anyaa (PW2) is the mother of Iyese and the deceased. She testified on how Iyese injured the deceased with a machete. There is no evidence on record to suggest why she could lie against the accused.

c) All the defence witnesses went to scene between 7.30 a.m. and 8.30 a.m. whereas the evidence by the prosecution indicate that the incident took place at 6 a.m. These witnesses testified to have gone there after the fight except for Hellen Atwana Ikapian (DW2) who said that when she arrived at 8.30 a.m., she found the two brothers fighting. Her evidence contradicted that of Obadiah Osukuku Ong'oro (DW3) who testified that he went to the scene after receiving a call from the area assistant chief at 7 a.m. When he arrived, he said he disarmed Stephen Iyese.

d) The evidence of Hellen Atwana Ikapian (DW2) is that she went to the scene after she had heard screams at 8.30 a.m. This contradicted the evidence of the area chief Gad Iluku Olola (DW5) who testified that she telephoned him at 7 a.m., to inform him that Susan's sons were fighting.

12. The upshot of the analysis of the evidence on record is that the defence of the accused is not convincing and I accordingly dismiss it.

13. For an offence of murder to be proved, malice aforethought must be shown to have existed. In **Black's Law dictionary, 10th Edition** malice aforethought is defined as:

The requisite mental state for common-law murder, encompassing any one of the following (1) the intent to kill (2) the intent to inflict grievousbodily harm (3) extremely reckless difference to the value of human life (the so-called "abandoned and malignant heart"), or (4) the intent to commit a dangerous felony (which leads to culpability under the felony-murder rule).

Section 206 of the Penal Code gives instances when malice aforethought may be proved. It provides:

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.

14. In the instant case, I find that the prosecution has not proved the existence of malice aforethought. Therefore, the offence of murder has not been proved. However, the prosecution has proved beyond any reasonable doubt the lesser offence of manslaughter. I accordingly reduce the charge of murder to that of manslaughter. I acquit him of the charge of murder. I find him guilty and convict him for the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

DELIVERED and SIGNED at BUSIA this 8th day of April, 2020

KIARIE WAWERU KIARIE

JUDGE