REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL CASE NO. 3 OF 2015

REPUBLIC..... PROSECUTOR

VERSUS

FONDO KALAMA KITSAO..... ACCUSED

Coram: Hon. Justice R. Nyakundi

Ms. Sombo for State

Ms. Chepkwony for Accused person

JUDGMENT

The accused was charged of the offence of murder contrary to Section 203 as punishable under Section 204 of the Penal Code. The particulars of the case are that on 30.1.2015 at Midodoni village at Ganze Sub-location, Kilifi County, the accused jointly with another not before Court murdered **Ngowa Mwaringa Mume.** He denied the charge and at the trial he was represented by Learned Counsel **Ms. Chepkwony** whereas **Ms. Sombo** appeared for the state.

In order to disapprove the innocence of the accused person, it was incumbent upon the prosecution to proof the charge beyond reasonable doubt. In this respect, seven prosecution witnesses were called to give evidence as to the accused person involvement in the murder of the deceased.

According to **PW1 - Taabu Ngowa,** widow to the deceased, **PW2 – Nyevu Ngowa** also daughter to the deceased testified that on the night of 30.1.2015 at Midodoni, some people entered into their house and did fatally attack the deceased. Initially the same night **(PW1)** and **(PW2)** stated in Court that the deceased had stepped out of the house with a wine tapper, (the accused person before Court) **(PW1)** and **(PW2)** proceeded to state that the deceased returned later in the night and before retiring to bed they served him with a meal. As he continued to partake of the food, suddenly two assailants, one of whom was positively identified as the accused violently attacked the deceased. PW2 who also happens to know the accused as a frequent wine tapper, tried to inquire from him why they were killing the deceased with no answer forthcoming. According to **(PW1)** and **(PW2)** the other accomplice immediately left the scene leaving the accused. They continued inquiring from him to tell them the reasons of killing the deceased.

On cross-examination **(PW1)** told the Court that the fatal blow was inflicted by the person not before Court but nevertheless he came into the homestead in company of the accused. As for **(PW2)** answer to cross-examination in this respect the deceased had gone out with the accused to take palm wine. She also adduced evidence to show that the deceased did return from the Mnazi club and similarly did participate in preparing the evening meal for the deceased before the two men appeared at the scene. Further the accused as of the prime suspects was able to be identified by his physical features including his clothes being a black shirt and trouser. That he was also holding a torch to illuminate some light within the compound.

PW3 – Katana Mwaringa Mume testified as a brother to the deceased in regard to the events of 31.1.2015 when he was informed of the attack and subsequent of death of the deceased. His statement under oath also confirmed that he travelled to Kilifi Hospital Mortuary where he identified the body of the deceased to the pathologist who conducted the post-mortem – examination. He also told the Court that prior to the fateful day accused had been working for the deceased.

PW4 – No. 226215 – David Kazungu testified in regard to the visit he made to the scene of the assault which had occurred against the deceased. On their way to the scene, (PW4) told the Court that the deceased prior to his death was being taken to the hospital. When examined at Ganze dispensary the case was referred to Kilifi Hospital. In the morning a report was received that he had passed on due to the injuries inflicted at Midodoni area. Thereafter, investigations carried out summed up that the accused was one of the assailants. He was therefore arrested to be prosecuted for the offence.

PW5 – Karisa Ngulu also of Ganze – village testified that on 30.1.2015 he heard screams from PW1's house. The witness said that in response to the scene he met the accused running away very fast. Further the witness gave evidence that on arrival PW1 and PW2 had started mourning. The witness confirmed to the Court that the said accused was employed as a wine tapper. During the course of employment, the witness explained that in certain instances accused failed to remit money from the wine tapping. In cross-examination, the witness told the Court that he positively identified the accused due to his prior familiarity and the same clothes he usually wears. He also told the Court that by the time he was headed to the scene accused had already left the scene of the murder.

PW6 – No. 233894 Inspector Solomon Saul told the Court that he received the report on the death of the deceased. In the same report names of Hamisi and the accused were given as main suspects who assaulted the deceased in the course of the night. He visited the scene where he drew the sketch plan documenting details of the murder. The witness also participated in identifying the body during the post-mortem examination at Kilifi District Mortuary. As the accused had been identified by (PW1) and (PW2) it became necessary to effect arrest and prefer a charge of murder.

PW7 – Dr. Nassir gave evidence with regard to the post-mortem examination dated 5.2.2015. According to PW7, the pathologist testified that the deceased was found to have suffered deep multiple cut wounds on the front and left parietal area of the skull. She described and reported the cause of death to be deep multiple head injuries due to intracranial bleeding.

The state closed its case and the accused person was placed on his defence. The accused elected to give a sworn statement. The basis of the accused defence was to the effect that he worked as a wine tapper for quite sometime more so in the home of PW5. Following the death of the deceased, he was arrested by the police for an offence he did not commit. The next thing he remembered was in connection with a minor difference he had with PW1 culminating her in couching PW2 to fabricate evidence against him of this crime which he knows nothing about.

At the close of both the state and defence case, the Learned Counsel **Ms. Chepkwony** submitted that the whole of the prosecution case did not prove the elements of the offence to warrant the accused to be convicted for the offence of murder contrary to Section 203 of Penal Code. Taking the queue in the dictum and guiding principles in **Woolmington v DPP {1935} AC 462 and Miller v Minister of Pensions {1942} AC** counsel submitted that at the close of the prosecution case the legal and evidential burden of proving a case against the accused fell short of the threshold. Learned counsel further cited the significance of the burden of proof as illustrated in the cases of **Bakari v State {1985} NWLR and United States v Smith 267 F 3d 1154, 1161 (DC Circ 2001).** In Counsel's observations and submissions taking account the required elements to be proven the prosecution evidence failed to satisfy the criteria in **R v Andrew Omwenga {2009} eKLR.** In the same vein counsel argued and submitted that the evidence was inconsistent and barely adequate to proof the charge beyond reasonable doubt.

It was the contention of counsel for the accused that there was no direct or circumstantial evidence to prove that the accused committed the offence on which the Court can rely upon to support the conviction.

In this respect Learned prosecution counsel opted out of filing any final submissions, leaving the Court to determine the case based entirely on the evidence brought out by the witnesses.

Analysis and Determination

The next question to consider is whether on the basis of the evidence the killing of the deceased was unlawful and accompanied with malice aforethought. In our criminal justice system, the prosecution bears the burden of proof on the existence of facts or non-existence inorder to obtain Judgment in their favour for the indictment of the accused.

Who wins and who loses the case will depend on who has gone furthest in persuading the Court that the existence or non-existence of the facts being relied upon are capable of establishing the truth. (See Section 107 (1) and 108 of the Evidence Act). In the comparative precedent of **Common Wealth v Webster 59 Mass 295, 320 California Supreme Court** stated as follows:

> ***"What is reasonable doubt? It is a term often used probably pretty well understood, but not easily defined. It is not mere possible doubt, because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty, of the truth of the charge. The burden of proof is upon the prosecutor. All the presumptions of Law independent of evidence are in favour of innocence, and every person is presumed to be innocent until he is proved guilty. It upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. For it is not sufficient to establish a probability, though a strong one arising from a doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and Judgment, of those who are bound to act conscientiously upon it. This we take to be proof beyond reasonable doubt.*** **(See also Woolmington v DPP, Miller v Minister of Pensions (supra)**

In response to the charge, Section 203 of the Penal Code under which the accused person has been charged provides:

> ***"That any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder. At the heart of the offence of murder is the ingredient on malice aforethought."***

In the instant case, I heard the evidence of the seven witnesses and its incumbent upon the prosecution to satisfy the following elements:

> ***(1). That accused caused the death of Ngowa Mwaringa Mume.***

(2). That the accused conduct was by an unlawful act.

(3). That the accused caused the death with malice aforethought.

(4). That in killing the deceased with another not before Court there is proof of common intention.

(5). All those put together show that the accused was positively identified as the perpetrator or one of them who killed the deceased.

As regards the death of the deceased, there is no dispute as inferred from **(PW1), (PW2), (PW5)** and the post-mortem examination report produced by **(PW7)** that the deceased died on 31.1.2015. The medical evidence therefore does confirm that the right to life under Article 26 of the Constitution to be enjoyed by the deceased was prematurely terminated unlawfully.

The second ingredient falls within the category of the unlawful acts or omission. The definition under Section 203 of the Penal Code postulates the unlawful killing of another human being without justification or legal excuse. The accused person would be held responsible for the death of the deceased through exacting a combination of factors that his act or omission resulted in the death. causation as defined under Section 213 of the Penal Code remains a central issue which connects the acts or omission of the accused with the death of the deceased **(See Rex v Sirasi Bachumira {1936} 3 EACA 40).**

As far as this ingredient is concerned, the prosecution must specifically proof that the accused intentionally inflicted bodily harm purposefully in order for the death to follow from the grievous harm. In sum, on scrutiny of the evidence by (PW1) and (PW2) reveals that on 31.1.2015 the accused and the deceased spent considerable time together both at home and at the wine tapping. He arrived home in the midst of the night and upon being served with a meal by (PW2), accused person and another directly came to the house, assaulted him causing bodily harm. Thereafter be succumbed to death while undergoing treatment at Kilifi District Hospital.

In the testimony of (PW1) and (PW2) they recollected that the deceased suffered a protracted beating by use of a wooden stool targeted against his head prior to his death. Further by PW7 medical evidence on post-mortem examination report this was a victim who apparently sustained multiple injuries to the head. The cause of death on the post-mortem report was indicated as head injury. In their evidence PW1 and PW2 stated that the accused while committing the crime was accompanied with another who was wearing a mask, unlike the accused. It is significant and more importantly clear as pointed above by the prosecution witnesses to acknowledge that the deceased is dead and his death was unlawfully caused.

This does distinguish murder as an aggravated homicide from any other unlawful homicides i.e. manslaughter or causing death by a negligent act.

In terms of Section 206 of the Penal Code

"Malice aforethought is deemed to be established by the evidence put forth proving anyone or more of the following circumstances:

(a). An intention to cause the death or to do grievous harm to any person, whether such 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 such 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 wist that it may not be caused.

(c). An intent to commit a felony.

(d). An intention by an act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

In the case of **Guyo Duba v R CACRA No. 89 of 1999 the Court of Appeal** held interalia: ***"That intention to kill may be inferred from the facts of the case."***

This ingredient as an important factor is premised on the principles in **Rex v Tubere s/o Ochen {1945} 12 EACA 63** where the Court stated that:

"malice aforethought can be determined by establishing through evidence. The weapon used, the manner in which it is used and the part of the body injured…."

It is therefore a question of fact on what the accused person did before, during the unlawful act itself and even after, the Court has to look at these circumstances to determine manifestation of malice aforethought. **See also the dictum in Rex v Mwita s/o Ogonde {1944} 11 EACA 75, Mugao & Another v R {1972} EA 543, Morris Aluoch v R CACRA No. 47 of 1996, Isa Mukabya v R {1963} EA 376, Nyambura & others v R {2001} KLR 355, Karani & 3 others v R {1991} KLR 622.**

The common thread running through the authorities referenced above is that the circumstances said to constitute murder constituted use of a murder weapon specifically targeted at the vulnerable parts of the victim body. Further, in so assaulting the deceased, accused person

purposed to inflict multiple deep seated wounds as contemplated under Section 4 of the Penal Code on grievous harm. That in performing the unlawful act or omission, accused person knows that there is a high probability of death ensuing against that other person.

However, under upon review of the evidence, I am persuaded that the crime of murder against the deceased was committed within the context of and meaning of Section 21 of the Penal Code on common intention. It provides that:

> ***"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with 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."***

I am mindful of the various decisions of the superior Courts touching on Section 21 of the Penal Code. **Solomon Mungai v R {1965} EA 363, Abdi Ali v R {1956} 23 EACA 573, R v Cheya {1973} 500.** Further in the case of **Njoroge v R {1983} KLR 197** the Court of Appeal re-emphasized the doctrine of common intention in the following words:

> ***"If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder in all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavors to effect the common object of the assembly."***

The rule as to common intention was also reaffirmed in **R v Tabullyenka s/o Kirya {1943} EACA 51:**

> ***"That the common intention may be inferred from their presence, their actions and the omissions of either of them to disassociate himself from the assault."***

Here focus is on the results and any act or omission of an accomplice which results in the death of another human being will suffice. It is very often the case that the following questions ought to be answered in culpable homicide with corpus of common intention. That the accused is a party to the murder of the deceased for omitting to stop the co-accomplice from doing anything that would cause the death of the deceased. Secondly, that when the co-accomplice was inflicting the fatal injuries he abetted and aided him in committing the crime. Thirdly, that the accused and his accomplice approached the prosecution of the murder with a common intention to carry out an unlawful purpose and to assist each other therein to kill the deceased.

In the case before me now, (PW1) and (PW2) evidence links the accused with the death of the deceased. To this end accused stepped out of the house with the deceased purposely to tap wine. Thereafter on or about 10.00 p.m. the deceased returned home without the accused. It was (PW1) and (PW2) evidence that the accused and another emerged soon thereafter and went straight to attack the deceased with lethal weapon. As the accomplice pulled the murder weapon, and aiming it at the deceased, its clear that the accused did nothing to restrain him or as of necessity take preventive measures to avoid the deceased being hit by his accomplice. The facts themselves negate any defence that during the assault accused person was an innocent by stander that he will not have known of the intention of his co-accomplice.

I am presently of the view that the facts of this case are in tandem with the provisions of Section 21 of the Penal Code on common intention. Therefore, the incidence of PW1 and PW2 implicates the accused with the assault and contemporaneous or spontaneous event of death. unlike the defence statement that PW1 and PW2 evidence was full of concoction or distortion, I am satisfied that the killing of the deceased was done by the accused and another accomplice not before Court. I find no evidence to make one disbelieve their testimony on what they saw take place on 31.1.2015. In the circumstances of the case the unlawful act which caused the death of the deceased was actually corroborated by the medical evidence given on the contents of the post-mortem report by (PW7). That in my view, constitutes proof of unlawful death beyond reasonable doubt.

In my earlier review, I pronounced myself as to the element on malice aforethought. Basically, the actual intention to cause death or to do grievous harm as defined under Section 206 of the Penal Code. From the evidence of PW1 and PW2 the deceased was killed without any justification or excuse in a brutal manner with a lethal weapon targeting his head. For practical purposes when a man hits another through the head with such express and violent force, the effect and intention of it is to cause death or to do grievous harm. Under Section 4 of the Penal Code grievous bodily harm for purposes of committing the murder the injury need not have to be either permanent and dangerous. It sufficient that the gravity of the injuries does interfere with the comfort, health or right to life of another human being.

The pathologist **(PW7)** opined that the deceased died as a result of the head injury due to the assault. If a man administers beatings or stabbing and any such unlawful act or to do bodily harm to the extent that would bring complications to the health of that person and death results, then that is sufficient enough to constitute murder caused with malice aforethought. In the instant case in the presence of the co-accomplice a weapon used as a murder weapon was willfully and voluntarily discharged against the deceased substantially with an intention to cause death. The conclusion that follow therefore is the killing of the deceased was actuated with malice aforethought under Section 206 (a) (b) (c) of the Penal Code.

The other significant part of the evidence in this trial deals with identification of accused. The thrust of this element of the trial is grounded on the principles laid down in **R v Turnbull {1976} 3 ALL ER 549:**

> ***"First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the Judge need not use any particular form of words. Secondly, the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At***

what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification of the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence.

Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made. All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger. In our Judgment when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbor, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it: provided always, however, that an adequate warning has been given about the special need for caution. Were the Courts to adjudge otherwise, affronts to justice would frequently occur.

The essence of the case on identification against the accused is to be found in the witness statement of PW1, PW2 and PW5 respectively. According to PW1 and PW2, the accused came to the scene of the crime with another man. They went straight to the location where the deceased was having a meal. In hand of the co-accomplice was a wooden stool which they used to hit the deceased. It is also evident the principal perpetrator ran away from the scene leaving behind the accused. The accused also initially left home with the deceased for the sole purpose to tap-wine. In the present case and according to (PW1) and (PW2) evidence, though having left together accused remained behind only to follow the deceased much later and in company of another not known to the witnesses. What was intriguing to (PW1) and (PW2) the two persons acted in concert to commit the crime and any plea for them to stop attacking the deceased went unheeded. The witnesses alleged that the accused description, knowledge and visual identification was made possible because he had been an employee of PW5 as a wine tapper for a long period of time.

According to (PW1), (PW2) and (PW5) there were sources of moonlight which assisted them to positively identify the accused. It is also noted in addition to this source of light the witnesses were familiar with the accused as their employee. At that material day (PW1) and PW2 had seen the accused leave for wine tapping with the deceased. As the accused and his accomplice attacked the deceased, (PW1) had a conversation with him with a plea for them to stop the unlawful act. The witnesses also gave the description of the accused and the type of clothing wear worn on that particular night. The reliability of moonlight and the previous familiarity rests the case on strong favourable recognition evidence. Keeping in mind the quality of the evidence available from PW1, PW2 and PW5 satisfies the criteria relating to identification free from error or mistake to place the accused at the scene of the murder.

In all the circumstances, I am satisfied that PW1 and PW2 saw the accused at the scene. There is also an obvious reason why in this matter I find identification of the accused credible, the adequacy of the circumstantial evidence from (PW5) who stated that while responding to the screams he met the accused on the way taking flight. There was no evidence that the physical appearance of the accused had changed materially between the time he went to tap wine and the time of the crime to impair their previous observations of the accused. These well considered observations satisfies the evidentially process in which the accused was positively identified.

For the aforesaid reasons, I find the accused guilty of the charge, convict him of the offence of murder contrary to Section 203 of the Penal Code.

Sentence

The offence of murder carries with a maximum sentence of death penalty. However, with the new dawn and from prudential direction by the Supreme Court decision in **Francis K. Muruatetu v R {2017} eKLR.** The mandatoriness of the sentence was found to be unconstitutional. It follows therefore, the decision on what sentence to pass against a convict of murder is in the realm of discretion of the trial Court. Where on material period before the Court it's possible to mete out the death penalty its open for it to do so on account of compelling factors and sentencing guidelines judicially and deservedly.

In reference to an appropriate sentence it was urged upon this Court to pass a non-custodial or in the alternative short custodial sentence for reasons that the convict is a young man, he is remorseful and regrets the offence.

Further, Learned prosecution counsel canvassed for a stiff custodial sentence necessary to punish the offender for this heinous crime and deter the would be offenders. Thus, Learned prosecution counsel argued that in matters of right to life no one has an authority to take the life of another without any excuse or justification.

Sentencing verdict and reasons

The right to life is anchored in Article 26 of our Republic Constitution, which obligates every citizen or residents of Kenya to protect the right to life of others. This guarantee to life can only be interfered with as provided for under this constitution or any other written Law. The convict's case does not fall within the exceptions postulated in the Law.

I have considered the mitigatory factors of being a young man, at the prime of his life. The counsel is also said to have a family which needs him back home to provide for them within the demands of traditions and customs. However, these mitigation account for less score card towards determining an appropriate sentence.

In this matter, speak of the aggravating factors a human life of another was lost though a premeditated criminal act of the convict. A related point was made in the trial which gave an impression that the motive behind the killing of the deceased was on allegations of practicing witchcraft. There was no coincidence of provocation and witchcraft to use the weapon to kill or cause grievous harm as the convict did against the deceased. The Court considered that the deceased was violently hit on the head with a dangerous weapon whose stab wounds to the skull undoubtedly caused death. The medical evidence tendered showed that such degree of force had been used as there was a depressed fracture of the skull.

All these pointed to the acts of a person who had specific intent to cause permanent injury to the deceased. The lethal weapon also indicated a malicious intent.

I am sorry to the convict that the plea on mitigation is of a nature weighed alongside the aggravating factors, he stands no chance of a non-custodial sentence. All positive indicators are for fair, and appropriate sentence to punish the crime of killing the deceased and for the Court to send a strong message that time has come for the residents of this county not to take the Law into their hands to kill one another without any provocation or iota of self-defence.

In sentencing the convict I bear in mind the provisions of Section 333 (2) of the Criminal Procedure Code. From the record the convict has spent close to five years in remand custody. I discount that period and do hereby sentence the convict to thirty-five (35) years imprisonment. Instead of the initial period of forty (40) years.

14 days right of appeal explained.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 13TH DAY OF OCTOBER 2020

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R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Alenga for the state

2. Ms. Mettoh for the accused person