



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL CASE NO. 59 OF 2009

REPUBLIC.....DIRECTOR OF PUBLIC PROSECUTIONS

VERSUS

PETER MUHATI ONDUSI.....ACCUSED

JUDGMENT

1. Peter Muhati Ondusi is charged with murder, contrary to section 203, as read with section 204, of the Penal Code, Cap 63, Laws of Kenya. The particulars of the offence allege that on 7th December 2009, at Kwirinyi area in Kakamega East District, within Western Province, jointly with another, not before the court, he murdered Edwin Musamali Mukabwa, hereinafter referred to as the deceased. He pleaded not guilty to the charge on 23rd March 2010. The hearing of the prosecution's case commenced on 15th March 2011. The prosecution called four witnesses.

2. The first on the stand was Harun Ikutwa, who testified as PW1. He stated that he hailed from Shinyalu area. He stated that on 7th December 2009, at about 7.00 PM, the deceased went to his house and informed him that a child of Cynthia had been stolen by two people. They both got out of the house in pursuit of the two, and on the way they met a Stephen, who informed them that he had seen a Isaya and the accused with a child. As they knew both, they ran towards their home. They caught up with the two and the child. The accused put down the child, and cut the deceased across the chest once with a machete. The deceased fell down, whereupon the witness began screaming. A crowd formed, and the deceased was helped to get up, and the witness escorted him to Mukumu Mission Hospital. He died at about 8.00 PM the same day, while undergoing treatment. The witness made a report of the incident at the AP Camp at Khayega, and thereafter went home. He stated that he knew the accused since birth, as he was his relative within the clan. He stated that both the accused and his accomplice, Isaya, escaped, but the accused later surrendered to the police. He stated that he did not know the father of the child that had been stolen by the accused. He stated that the accused and the deceased did not fight over the child. He was among those who identified the body of the deceased during post-mortem

3. Fredrick Luyanje testified as PW2. He stated that he was present at the autopsy on the body of the deceased on 10th December 2009. He said that he identified the body of the deceased to the pathologist.

4. Number 59307, Police Constable Samson Bor, testified as PW3. He stated that he was among the officers mandated, on 8th December 2009, at about 10.00 AM, to visit the scene of the murder. When he got to the scene, he got information that the accused and the deceased had fought at the scene the previous night. The deceased was later rushed to Mukumu Mission Hospital where he died. At the hospital, the witness found the body of the deceased on a stretcher. He had apparently been cut on the chest. He and his colleagues took over the matter at that stage. They caused the body to be put in the mortuary at the Mukumu Mission Hospital, and then he went back to the police station. On 9th December 2009, a post-mortem was done on the body at Mukumu Mission Hospital, which was conducted by Dr. Kamau. By then the accused had been arrested. After the post-mortem, the body was handed over to the family for disposal. He stated that he understood the deceased to have been cut with a machete, which the assailant disappeared with, and the same was not recovered.

5. Dr. Dickson Mchana Mwaludindi testified as PW4. The consultant pathologist testified on behalf of Dr. Kamau SM, who had conducted the post-mortem on the deceased, and who had since died. According to the post-mortem report that he produced, dated 9th December 2009, which had been done on the same date at the Mukumu Mission Hospital, the body was identified by PW1 and PW2. The pathologist noted that the deceased's clothing was soiled and blood-stained. His age was assessed as thirty-six years. Externally, he noted a big cut wound on the front of the chest, measuring 20 by 25 centimetres, with sharp margins. The wound was described as gaping. Internally, an open wound was noted, on the front chest with fractures of the 2nd and 3rd ribs on either side, with bleeding into the chest cavity and lung collapse. It was noted further that the major vessels on the chest had been severed, otherwise all the other systems were normal. The opinion of the pathologist was that death was caused by severe bleeding and trapping of air in the chest, as a result of a penetrating injury, following assault. He then filled a burial permit, and signed the post-mortem report. At cross-examination, he stated that the cut was on the upper front chest, just below the collar bone, going across the chest rather than downwards. He stated that the cut could not have caused the intestines to come out.

6. After PW4 testified, the state closed its case. I reviewed the record, and formed the opinion that a *prima facie* case had been established against the accused, and I, on 25th October 2019, put the accused on his defence.

7. The accused took to the witness stand on 2nd March 2020. He gave a sworn defence statement. He testified that Isaya had asked him, on 7th December 2009, to escort him to marry a woman. They walked together to the home. Isaya left him at the gate, and walked into the compound. He came out with the woman he was to marry, whose name he identified as Iminza, and a child. He escorted them to Isaya's home, and thereafter left for his home. He stated that he later heard that PW1 and another person, who he named as Ejiro, came to Isaya's home. He heard people fighting at Isaya's home. The group then came to his home; after which they went to a road nearby. Isaya indicated that he had not stolen the child. He identified the people at the scene as himself, Ejiro, Isaya, Ikutwa and another person. He informed the group that if Isaya and the woman had agreed that he would take her as his wife, then there was no problem. PW1 challenged him, asking him in what capacity he was talking. He stated that Ejiro had a machete, and he attempted to cut Isaya with it. Isaya ducked, and the machete hit PW1 on left side of the chest. He then later changed his testimony to say that it was PW1 who had a machete, and not Ejiro, and that it was Ejiro who was cut with the machete by PW1. After that the accused and Isaya left to their respective houses. PW1 also rushed to his home, and Ejiro was left lying at the scene. At 9.00 PM, that night, he heard the sound of a motorcycle at the scene, after which everything went quiet. The following morning a huge crowd came to his home, and cut down his maize. He fled and made a report to the local authorities, who arranged to have him to be escorted to the police. He stated that PW1 and Ejiro were talking about Iminza, and they were complaining about Isaya having taken her and the child. He described Iminza as an in-law of PW1 and Ejiro.

8. During cross-examination, he stated that he knew the deceased as Ejiro, who was a brother of PW1. He stated that it was PW1 who had a machete, and not Ejiro. He stated that PW1 wanted to cut Isaya, but missed and ended up cutting his brother, the deceased. He and Isaya left to their respective homes, leaving Ejiro at the scene. PW1 also left the deceased at the scene, he stated that the deceased was cut on the chest, and that he did not see any other injuries. He said he did not beat the deceased, and did not know where Isaya went after the incident. He denied that they had taken the child by force.

9. At the close of the oral hearing, the defence filed written submissions. It is submitted that the prosecution was riddled with inconsistencies, which are pointed out, between the testimonies of PW1 and PW3. It is argued that PW3 did not mention PW1 as one of the persons who gave him information as to what might have happened at the scene, which would mean that the evidence of PW1 was not corroborated. It is also argued that PW3 had said that it appeared that there had been a struggle at the scene, which contradicted the testimony of PW1 who had said that there had been no struggle. It is also submitted that one of the prosecution witnesses, who is not identified, had said that as a result of the cut the intestines of the deceased came out, and he helped to return them, which was not consistent with the testimony of the pathologist. It is also pointed out that there was inconsistency as to how the accused was arrested. It is also contended that PW1 was the single witness and that there was a danger of relying on the evidence of a single identifying witness, and cites *Abdalla bin Wendo vs. R* [1953] 20 EACA to support his case. It is further submitted that the testimony of the accused was more believable compared with that of PW1. It is also submitted that the malice aforethought was not established, and finally that the evidence tendered was barely enough to sustain a conviction for murder.

10. The prosecution did not file any written submissions, nor make any oral submissions.

11. The elements of the offence of murder, as defined in section 203 of the Penal Code, are the fact of death, the cause of the death, the role of the accused person in the cause of the death and the fact that the death is caused by the accused with malice aforethought.

12. From the material before me there is *prima facie* proof that the deceased in fact died. PW1 was at the scene when the deceased was injured, he took him to hospital, and was present when he died. PW3 was the investigating officer. He saw the body of the deceased at the hospital, and it was he who supervised its transfer to the mortuary. PW2, alongside PW1, identified the body of the deceased to PW4 for post-mortem purposes. PW4 did the post-mortem on the body, to identify the cause of his death.

13. On the second aspect of the crime, cause of death, PW4 testified on behalf of the pathologist, who had conducted the autopsy, the late Dr. Kamau. The cause of death was stated to be cardiopulmonary arrest due to severe haemorrhage and pneumothorax, as a result of severe penetrating chest injury, secondary to assault. The injury identified by the pathologist, as cause of death, is consistent with the injury described by PW1, PW3 and the accused.

14. The third element of the offence, would be the role of the accused in the possible causation of the deceased's death. This denotes that the death of the deceased was caused by the accused. Of the four individuals who took to the witness stand, only PW1 and the accused were at the scene at the material time. PW1 told the court that it was the accused who struck the fatal blow. According to the accused, the fatal blow came from PW1, not aimed at the deceased but at Isaya, the accused person's alleged companion on the material night. It is the two who know what transpired. Both gave sworn statements. It is clearly a matter of the story of PW1 against that of the accused. It would appear that the accused did not run away from the village or hide as implied by the PW1. He was arrested the next morning. According to him, he sought safety, after a crowd invaded his home and destroyed his property, with the local *liguru*, who escorted him to the police.

15. Since there were other eyewitnesses to the event, it behoved the prosecution to do more. The testimony of the investigating officer, PW3, does not assist the prosecution very much. He did not identify the witnesses who he interviewed before concluding that the accused and the deceased fought, and that it was the accused who injured the deceased. He talked of being informed by villagers at the scene as to what might have transpired. According to PW1 the assault happened in the presence of only the PW1, the deceased, the accused, Isaya, the woman and the child. He did not talk of the presence of any villagers. The crowd only formed after the event, in response to his screams. The alleged villagers could not possibly give a credible information on what transpired since they only came to the scene thereafter. Curiously, PW3 did not mention PW1 as the source of his information. This is a case where the prosecution ought to have called more witnesses, such as the woman who the accused is alleged to have marked or the mother of the child alleged to have been stolen. It is not clear who she was. She was variously referred to as Cynthia, Iminza and Cynthia Kavesa. She was described as a spouse of the accused, by the prosecution, yet PW1 did not identify her as his sister or how he was related to her and the deceased, nor as a spouse of the accused. The accused did not identify her as his spouse, instead he said that she was in the process of getting married to Isaya on that material night. At least one of the persons who came to the scene in response to PW1's screams ought to have been called to corroborate PW1's story.

16. The fourth element relates to malice aforethought. What constitutes malice aforethought is set out in section 206 of the Penal Code, which states as follows:

“206. 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.”

17. Malice aforethought is the intention to be inferred from either some conduct or facts. It is linked to the third factor, the role of the accused in the causation of the death of the deceased. In this case, the cause of death was established, it is not clear as to whether the accused person had any role in the cause of death. PW1 and the accused person accuse one another of causing the death, both gave sworn statements, and gave testimonies that were fairly flowing, and it is not possible to tell, who between them was telling the truth. The blow inflicted on the deceased caused his death in a matter of an hour or so. It could only have been inflicted with malice. However, the same has to be linked to the role of the accused person in the causation of the death. Given that it cannot be determined between PW1 and the accused person, as to who inflicted the injury, the malice that caused the death of the deceased cannot be attributed to the accused.

18. Overall, I do not find material upon which I can convict the accused person herein, Peter Muhati Ondusi, of the charge that he faces. I accordingly find him not guilty and acquit him of the charge of the murder of Edwin Musamali Mukabwa. He shall be set free from remand custody, if at all he is in remand in connection with this case, unless he is otherwise lawfully held.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 2nd DAY OF October, 2020

W MUSYOKA

JUDGE