



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL CASE NO 32 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

JACQUILINE AYISI SHIBUTSE.....1ST ACCUSED

ANTONY AYISI SHIBUTSE2ND ACCUSED

R U L I N G

1. The two accused are charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on the 6th August 2014 at Buyokha village Museno sub location in Kakamega East District within Kakamega County jointly with others not before court murdered Alexander Tieni Selebi (herein referred to as the deceased).

2. The prosecution case is that the deceased was working in Mombasa. That on the evening of 5th August 2014 he called his wife PW1 at Musingu in Sigalagala and informed her that he was on his way home from Mombasa. That the deceased did not arrive home on the expected day which was on the following day. It was later learnt that on 5/8/14 at 11.30 a.m he had gone to the shop of Agapitus P.W.3 at Sigalagala where he had asked the shopkeeper to keep his bag for him as he was going to deliver a letter to a certain person at Sigalagala primary school. The deceased never went back to pick the bag.

3. That on the 6/8/2014 at 2.45 p.m. a report was received at Shinyalu Police Station that there was a person who had been assaulted at Museno area on accusations that he was a cattle thief. Cpl Mwashu P.W.5 was sent to the scene. He went to the scene and found the deceased lying inside the compound of the two accused who are wife and husband respectively. The deceased was seriously injured with a severed hand. The severed hand was found inside the house of the accused. The 1st accused said that some people had stolen her cow and broken into her house. That after she screamed neighbours had responded and assaulted one of the thieves, the deceased. That her husband, the 2nd accused had been sleeping at the home of his second wife. That when he arrived to attend to the screams members of the public had already assaulted the deceased. That the stolen cow had been traced and returned home. Cpl Mwashu found the alleged stolen cow at the home. The police picked the deceased together with the severed hand and took him to Kakamega County Hospital. He died on 7/5/14.

4. The bag of the deceased was recovered from the shopkeeper P.W.3. A postmortem was performed on the body by Dr. Muchana PW6. He found the body with mixed cut wounds on the head and arms, fracture of the skull, injuries on the lower limbs with fracture of right knee and complete amputation of the left forearm. The doctor formed the opinion that the cause of death was due to a penetrative head injury. Cpl Mwashu PW 5 investigated the case. He did not believe the explanation by the accused. He charged them with the offence. During the hearing the doctor produced the post mortem report as exhibit, Pex 1.

5. At the close of the prosecution case, the advocate for the accused **Mr. Ondieki** submitted that the prosecution had not established a prima facie case against the accused persons. That nobody saw the accused persons inflict any injury to the deceased. That the accused were arraigned in court on suspicion that they were involved with the death of the deceased because he was found injured at their compound. That the investigating officer confirmed that he found over 50 people at the home of the accused who were armed with pangas and runguns. The advocates submitted that suspicion however strong cannot be the basis of placing the accused to their defence.

That if the accused opted to remain silent the evidence on record cannot sustain a conviction. The advocate urged the court to make a finding that the accused have no case to answer.

6. The state did not make any submissions.

7. The question is whether the prosecution has established a prima facie case against the accused persons to require them to be placed to their defence. It has been held that a prima facie case is:-

“one on which a reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation is

offered by the defence- see Ramanlal Trambaklal Bhatt Vs Republic(1957) EA 322.

8. The investigating officer PW 5 stated that the 2nd accused told him that he and some neighbours followed the stolen cow and recovered it. That they returned it home. The policeman however stated that he did not believe the story of the stolen cow because it was evident that the deceased had been assaulted inside the house of the accused persons where he recovered the severed hand. That a cattle thief could not have entered into the house. That he checked the door to the house and it had no breakage to support the allegations of the 1st accused that some people had broken into her house. Further that he checked for the hoofmarks of the cow to ascertain whether it had left the compound and came back and there were none. He concluded that the accused were lying that the deceased was a cattle thief.

9. Cpl Mwashu further stated that when they found the deceased in the compound of the accused he was writhing in pain and crying that he was not a thief.

10. There is no doubt that the deceased was assaulted at the home of the accused persons. He was found in the compound of the accused persons with serious injuries. He succumbed to the injuries at Kakamega General Hospital on the following day. The question is whether the accused were involved with the death of the deceased.

11. The prosecution relied on circumstantial evidence to connect the accused with the offence because the severed hand of the deceased was found in the accuseds' house. Before a court can convict on circumstantial evidence, the exculpatory facts of the case must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis other than that of guilt – see *Joan Jebichii Sawe –Vs – Republic* (2003) eKLR.

12. The accused allege that the deceased was assaulted by a mob when the 1st accused screamed that she had been attacked by thieves. Though the investigating officer PW5 stated that there was no breakage on the door of the accuseds' house, there were no photographs of the door taken to prove so. Though he said that there were no signs of the cow having left the compound of the accused he stated that there were many people in the compound. The people could have interfered with the hoofmarks.

13. The people Cpl Mwashu found in the compound of the accused were armed with pangas and rungas. It is likely that the people are the ones who assaulted the deceased. The circumstantial evidence does not point at the accused persons as the only people who had the opportunity to assault the deceased.

14. Murder is defined in section 203 of the penal code that provides that:

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder”.

15. Malice aforethought is defined in section 206 of the penal code thus:-

“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”.

16. In this case, the prosecution did not adduce evidence to prove malice aforethought. There was no evidence that the accused took part in causing grievous harm to the deceased that led to his death.

17. Though the allegations by the accused persons that the deceased was a cattle thief appears suspicious, the prosecution has not adduced evidence to dislodge the accuseds' explanation that the deceased was killed by a mob that responded to the 1st accused's screams that she had been attacked by thieves. In the premises the prosecution has not established a *prima facie* case against the accused. If the accused opted to remain silent if placed to their defence or gave the same explanation that they gave the police, they cannot be convicted of the offence of murder. I find that the accused have no case to answer. They are accordingly acquitted of the charge vide section 210 of the Criminal Procedure Code.

Delivered, dated and signed in open court at Kakamega this 13th day of February, 2019.

J. NJAGI

JUDGE

In the presence of:

Mr. Jumafor state

Mr. Ondieki..... for accused

Accused present

Court assistantGeorge

14 days right of appeal.