



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 56 OF 2016

LESIT, J.

REPUBLIC.....PROSECUTION

VERSUS

ANTHONY KARANI EKWARO.....ACCUSED

JUDGMENT

1. The accused **ANTHONY KARANI EKWARO** is charged with murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars are:

“On 12th June, 2016 at Kibera Undugu within Nairobi County jointly with others not before court murdered ABEDNEGO AWOUR NDONGA.”

2. The prosecution called a total of 8 witnesses. The brief facts of the case are that the deceased returned to his home at 2 a.m. with severe cut wounds on the forehead, middle and back of head with severe bleeding. He called out his wife PW1 and informed her he was attacked, beaten, slushed then robbed. He proceeded to tell her the names of those who committed that heinous act as Anthony, Toss and Ochieng. PW2 and 3, brother and mother of the deceased also said they were next at the scene after PW1, deceased wife, and that they too were given names of the attackers by the deceased.

3. That same night, area youth accompanied by deceased's brother PW2 went on a search for the named persons. They caught up with accused in his house still sleeping. He was taken to the Patrol Base where PW4 locked him up for his safety. Later PW4 handed over the accused to PW7 CPL Muthengi and PW8 IP Amagalla, both of Capital Hill Police Station. PW8 investigated the case before charging the accused with this offence.

4. The defence did not call any witness. The accused chose to give an unsworn statement in which he put forward an alibi as his defence. He said he bathed and slept on evening of 11th June 2016. The following morning he was woken up from bed and asked if he was ANTO. He said that he told the mob he was TONY. He was arrested by the mob and taken to the Patrol Base Police Post. The accused faces a serious offence of murder. In order to prove the case on the required standard of proof beyond any reasonable doubt, the prosecution must show:-

(a) That the injuries the deceased suffered were caused by accused

(b) That the injuries led to deceased death

(c) That at the time the accused inflicted the injuries on the deceased he had formed the intention to cause either death or grievous harm to the deceased and thus had malice aforethought.

5. The accused was represented by Mr. Mwangale Learned Defence Counsel while Ms. Onunga was the Learned Prosecution Counsel in this case. I have considered the submissions given by both Counsels and from these submissions and the evidence adduced the issues for determination deciphered are as follows:

(i) Whether the deceased made a valid dying declaration;

(ii) Whether there was any nexus, whether through direct or circumstantial evidence, to connect the accused with the deceased death.

(iii) Whether the accused made an admission or confession.

(iv) Whether the accused alibi defence dislodges the prosecution case against him.

6. Regarding the dying declaration we have the evidence of three witnesses who said that the deceased gave them the names of his attackers before he succumbed and died from his injuries. These were the wife PW1, the brother PW2 and the mother of deceased PW3. The names PW2 said deceased gave her were ANTHONY, TOSS and OCHIENG. The names PW2 said deceased gave him were TOSS, FRANK which he later changed to JIMMY, ANTHON and OCHI. As for PW3 she told that the deceased named his attackers as ABI, TOSS, OCHI, FRANK and ANTHONY OKWARA. The statement of the witness contained the same names except for Anthony whose second name OKWARA was missing in the list.

7. A look at the names given by these witnesses, it is clear the number of the persons named by the deceased varied. PW1 said she was given 3 names; PW2 was given four names, which names he changed once while PW3 said she was given five names. The fact the names kept varying is of concern in terms of the consistency of the dying declaration.

8. The variation in the alleged dying declaration is however not the only concern I have with the statement. The incident took place at night. It is clear that by the time the deceased arrived at his gate, it was 2 a.m. From the evidence of the three witnesses who had an encounter with the deceased before he died, none interrogated him in regard to the actual place of the attack. The court does not therefore know at exactly where the attack took place. It is clear he entered his gate to his house already injured.

9. The police do not appear to have made any effort to establish the actual place of attack. PW8 who investigated this case made no reference to any attempt being made to establish the place of attack.

10. The courts concern is very simple but critical. Under what conditions of lighting did the deceased see his attackers; were those conditions conducive for a positive identification of the 12 attackers? PW1, 2 and 3 were clear that whatever names the deceased gave of his attackers were of total strangers. They admit that they did not know the accused until his arrest. They admitted further there were many people known as Anthony. PW3 said she knew at least 3 others. The point is, it is not established beyond any reasonable doubt that at the time of attack the deceased was in a position to see and identify his attackers.

11. Secondly even if he may have seen them clearly, having given only one name for each of the attackers, it was impossible to rule out mistake on the part of those who went out to arrest the perceived attackers.

12. I noted that PW3, in cross-examination by the defence introduced a second name saying that the deceased gave two names of the Anthony who attacked him, that is, Anthony Okwara. She even went further to say that when the accused was asked to confess or be killed, he gave his two names and names of others as those who attacked the deceased.

13. PW3 changed her story regarding the names saying that in regard to Anthony, the deceased gave 2 names Anthony Okwara. That is unreliable because PW1 and 2 who also heard the deceased mention names of his attackers were clear he gave single names only. PW3's testimony is unreliable and it is clear it was made with the sole purpose of pinning down the accused with this offence.

14. Regarding nexus between accused and deceased death at the time of his arrest, the accused was sleeping in his house. He was picked by members of public PW7 and 8 who later took him from the hands of their colleague PW4 also commenced investigations into the case. No where did they say they went on a mission to establish the actual place of attack. Further they did not say they visited the accused home, if not for anything else to see if they could recover blood stained weapons, clothes, shoes or any such thing.

15. I find that the prosecution has failed to adduce any evidence to create a nexus between the deceased death and the accused.

16. The other issue is that of admission or confession. **Sections 17, 25A and 26 of the Evidence Act** describe what constitutes a confession and an admission thus:

17. An admission is a statement, oral or documentary, which suggests any inference as to a fact in issue or relevant fact, and which is made by any of the persons and in the circumstances hereinafter mentioned.

25A. (1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person's choice.

(2) The Attorney General shall in consultation with the Law Society of Kenya, Kenya National Commission on Human Rights and other suitable bodies make rules governing the making of a confession in all instances where the confession is not made in court.

26. A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible in a criminal proceeding if the making of the confession or admission appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

17. PW1 in her testimony stated that after accused was taken to the Police Station he gave many names of those involved in the attack including TOSS, OCHIBO and a lady's name she had forgotten. PW2 said he too heard accused admitting he was with others and deceased

at the time of attack but he (PW2) gave no names.

18. PW3 was candid that when the accused was taken to the Police Post he was asked to choose between confessing and being killed and that he chose to confess to which he said he was with Abi, Ochi, Brian and Frank. PW8 also said he heard the accused give 3 names of people he was with but he said he could not recall them.

19. PW4 who was with accused at the Police Post until PW8 took him away said accused was locked up in a side room for his safety. He said he did not hear him or anyone else mention any names.

20. Even if we ignore the contradiction of the names allegedly given by the accused according to PW1 and 3; and also ignore the contradiction in evidence of PW1, 2, 3 and 8 on the one hand and PW4 on the other, there is one more matter to consider. The circumstances under which the alleged admission or confession by the accused was made.

21. According to PW3, the accused was told to confess or die. It is therefore clear that the admission/confession by the accused was made after a threat on his life. PW8 describes the mob that was present at the Police Base and stated clearly it was so large, and was baying for accused life that he had to call for Re-enforcement from both Kilimani Police Station and Kibera AP Camp.

22. That was the mob which told the accused to either confess or be killed. Clearly, the admissions he made after the threat on his life was not voluntary but was through intimidation, threats and in the face of real danger to his life. Given PW8's evidence the threat on the accused life was real, grave and imminent. It could not be taken lightly. I find the admission or confession, having been made in those circumstances is wholly unreliable and ought to be disregarded, which I hereby do.

23. The last issue for determination regards the accused alibi defence. The law on alibi defence is clear. In the case of **UGANDA v. SEBYALA & OTHERS [1969] EA 204**, the learned Judge quoted a statement by his Lordship the Chief Justice of Tanzania in Criminal Appeal No. 12D 68 of 1969 where his lordship observed:

“The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts.”

24. The position in Kenya is the same as the one spelt out in the cited case. The law is clear that an accused has no burden to prove that his alibi is true. All that is required of him is to create doubt as to the veracity of the prosecution case. It is trite law that where the prosecution case is weak, an alibi defence can easily dislodge the same.

25. The accused stated that he was in bed in his house from evening of 11th June 2016 until morning of 12th June 2016 when he was arrested, which means the scene where deceased was severely wounded.

26. The prosecution has failed to adduce any evidence to establish the scene of the attack. Having failed to establish that basic point, accused defence remains uncontroverted that he was not at the alleged scene of attack.

27. The prosecution has given many names, varying in numbers and in character, alleging they are the ones deceased gave of his attackers. I have dealt with name Anthony. As stated hereinabove, witnesses admitted knowing more than one person by the name Anthony. Given the fact there were many Anthony's it is not clear which one the deceased meant.

28. PW3's attempt to introduce a second name to the name Anthony in order to implicate the accused more closely was, as I stated earlier unreliable. That attempt to implicate the accused by introducing a name similar to his other names was in my view also an afterthought.

29. I find the prosecution fell short was connecting the accused to the offence by his names. No evidence was adduced to connect him. The only other helpful evidence would have been to call Jimmy, alleged to have led the mob to accused house where he was arrested. If anything, he should have been called to tell the court on what basis he led the mob to accused home.

30. I have considered the entire evidence adduced in this case and I have come to the conclusion that the prosecution has failed to adduce evidence to establish the case against the accused beyond any reasonable doubt. I find that accused alibi defence dislodges the prosecution evidence against him and should therefore stand.

31. Consequently I give the accused person the benefit of doubt in this case and acquit him of murder contrary to **section 203** of the **Penal Code** under the provisions of **section 322** of the **Criminal Procedure Code**.

DATED, SIGNED AND DELIVERED THIS 7TH DAY FEBRUARY 2019.

LESIT, J

JUDGE