



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL CASE NO. 19 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

MBETSA BEJAH NYOTA.....ACCUSED

JUDGMENT

1. The accused person, MBETSA BEJAH NYOTA is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars are that:

“On the 22nd day of March, 2015 at around 9:00pm in Mariakani village in Kwale County within Coast region, the accused person jointly with others not before court murdered BEJAH NYOTA.

2. The accused was first arraigned in court in the year 2015 whereby he was informed of charge against him and remanded in custody to await psychiatric examination and for the Deputy Registrar to assign him counsel. The accused person upon being certified fit to plead by a psychiatrist, having been assigned counsel, entered a plea of “NOT GUILTY” to the charge. The trial commenced on 13th April, 2017.

3. The prosecution led by the learned state counsel, M/S Ocholla called a total of twelve(12) witnesses in support of their case while the accused, represented by M/S Challa, advocate opted to give a sworn statement and called no witness, all evidence recorded verbatim.

4. The offence of murder is defined under Section 203 of the Penal Code:

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

5. It is trite that in a criminal trial, the onus is always on the prosecution to prove the guilt of an accused person, and the standard of proof is that of, beyond reasonable doubt. This is a burden that an accused person does not assume to prove his innocence. He can only raise a defence or given an explanation, if he so chooses, to discharge his burden of proof.

6. For a conviction to lie for an offence of murder, the prosecution must prove beyond reasonable doubt that:

- (a) the accused died and the cause of death;
- (b) the accused caused the unlawful act or omission which caused the death; and
- (c) the accused had malice aforethought as defined under Section 206 of the Penal Code.

7. On the issue of the death of the deceased and cause of it, PW4, MBODZE RAI NDORO, wife to the deceased, MBEJA NYOTA told court that on 22nd March, 2015 at about 9:00pm, the deceased returned home from the shops at Mwangulu and she prepared supper which he ate and they retired to bed. And while in bed, PW4 said that two people who were armed with a panga and a torch came in and started cutting the deceased without saying anything. PW4 screamed but was told to shut up and sleep by the man who was carrying a panga.

8. PW4 said that she ran out of the house leaving behind her two children aged 10 and 7 years old respectively. PW4 ran to her co-wife, Nyangula’s place and informed her of what was happening. They screamed and ran back to her incomplete house which they had just moved into three days before. They found the deceased had already died. MANGALE BEJA, a son to the deceased and Nyangula, his first wife said he followed his mothers while armed with a panga but was flashed his eyes by a torch that he ran to the neighbours place to seek assistance.

He returned to find his father already dead.

9. Most of the witnesses confirmed that the deceased had died by either seeing his dead body lying in the homestead and attending his funeral/burial. For those who found his body lying dead or saw him in the mortuary, they confirmed that he had cuts all over the body.
10. PW12, CORPORAL FREDRICK KIBET of DCI Lungalunga gave evidence as the investigating officer and apart from testifying on court he visited the scene, saw the deceased's dead body and escorted it to the mortuary for post mortem examination, he also produced the post mortem examination form on behalf of the doctor who conducted the post mortem examination, which he indicated that the deceased had multiple cut wounds on the head, abdomen, back and hands so that the cause of his death was concluded to have been haemorrhage and severe brain injury.
11. In his sworn defence, the accused person did not dispute his father's (deceased's) death and the cause of it. He only disputed that he caused the same. As a result of all these evidence, the deceased's death and cause of it have been proved beyond reasonable doubt.
12. The next issue for determination becomes, whether the accused person caused the deceased's death. The accused person was held suspect arrested and charged with having caused the death of his father, the deceased. The reason for this was that the accused was alleged to have had a bad relationship with his father, the deceased, whereby he believed he was a wizard. Another reason he was held suspect is because a number of witnesses who are related to him said that he had approached them for financial assistance so he could finish his father who he claimed was a wizard and had been causing them problems.
13. The other reason was that, some of the suspects who were arrested in connection with the deceased's death, they implicated him as having been the one who planned the death of the deceased.
14. PW1 BEHA JAU BEJA, told court that while attending the deceased's funeral, he had engaged the accused person who had told him that he, one Mugadza from Mambo and Douglas Mbetsa had killed the deceased and were to kill Joseph then they go and stay in Nairobi for 6 months. He said that the accused person had told him that they had done so because the deceased was a wizard. He also said that he assisted in handing over the witchcraft paraphernalia, allegedly from the accused person to the police, a fact that was confirmed not to have been included in his statement to the when he was cross-examined.
15. PW1's evidence was to the effect that the accused person had confessed to him that he had killed the deceased. The question here then becomes, in what capacity was he taking a confession from the accused person? Was he legally competent to take a confession from a suspect?
16. PW2 told court that he was with his brothers Mangale Mwambodze and Kinango Mungare on 22nd November, 2014 when the accused person told them that his father, (the deceased) was disturbing him and asked them if they could assist him with cash so he would kill him. That they declined. He then said that on 17th December, 2014 the accused person called and asked him to go to their home at Mwangalu, Makwatani and he obliged. He met the accused person who sent him to go and collect someone by the name Mugadza from Mamba village and bring him to his home. He obliged and brought the person to the accused person's home.
17. PW2 went on to say that on 23rd February, 2015, the accused person again called and asked him to pick Mugadza from Mamba and that they would meet him on the way. PW2 obliged and when they got to a village called Timboni, they met the accused person who also boarded the motor cycle and they went upto a certain forest where the men got off the motor cycle and they went upto the forest while he remained on the road.
18. He said that after about 15 minutes, he saw the accused person and Mugadza emerge from the forest and this was after he had heard people making noise while saying in Kiswahili language that "Father is being killed!" He said he saw them having changed into pairs of shorts and were carrying blood stained pangas. That he was dumbfounded that he could not start the motor cycle and the two men run back into the forest.
19. PW2 was the witness who gave evidence that was almost close to an eye witness' evidence but when cross examined, it came out that his evidence with regard to when the deceased was killed contradicted the evidence of the other witnesses and the particulars of the charge. PW2 said that the day he escorted the two to the forest and suspects was the day the two killed the deceased as 23rd March 2015 while the other witnesses and the facts of the charge sheet give the date as 22nd March 2015. This inconsistency is material and goes to the root of the evidence.
20. Also, from the evidence of PW2 during cross examination, it came out that in his evidence in court he said that he saw Mugadza carrying a panga but in his statement to the police he said both Mugadza and the accused person were carrying pangas. Further PW2 said that he did not tell anyone he suspected the accused person and Mugadza for the death of the deceased because he was worried that he did not know how it would be taken by other people. The question becomes, was this reasonable in a situation where a serious offence had occurred?
21. PW3 said that the accused person approached him at his place of work and asked him for Kshs2000/= so he could use it to finish the issue of their father, (the deceased), causing them to undergo problems, which he said had been told to him by witch doctors. That he asked him this a 2nd time but PW3 refused to help him.
22. PW4, the 2nd wife to the deceased told court that she did not recognize and neither could she identify any of her husband's attackers on that fateful night.
23. This was also the evidence of PW5, MANGALE BEJA who got to the scene as the father (the deceased) was being attacked after being alerted by PW4.

24. PW6, KAINGU NJERA NYOTA told court that the accused person approached and requested him for contribution of Kshs1000/= so he could organize for his father (the deceased) to be killed since he was the cause of their problems. But in cross examination, it came out that he did not indicate this in his statement to the police, making it appear to be an afterthought.

25. PW7, SERGEANT JONAH MUTUI was one of the first police officers who went to the scene and found the deceased having been murdered, organized to have the body moved to the mortuary and handed over investigations to the CID at Lungalunga. He also testified that he was informed of the accused person being a suspect and was trying to leave the area and so he visited the scene to arrest him. But in cross-examination, he admitted that he did not mention the case of the suspect in his statement and could not conclude that the offence was committed by the accused person.

26. PW8, NGALAA JUMA NGALAA testified that the accused person approached him and requested for a contribution of Kshs1000/= so he could pay someone he had found to kill his father (the deceased) for being a wizard but he refused to give him. He then went on to state that in a family meeting after the burial of the deceased, the accused said that he, Mbetsa Mwabodze and Mugadza had killed the deceased for being a wizard. In cross examination PW8 said that he was with another cousin by the name Abubakar when the accused person called him with the request but this Abubakar was never called to record a statement to support the evidence by him. And on the issue of the accused person confessing to the killing of his father during a family meeting, it came out that some of the people he mentioned, such as Mwabodze Nyota as having been in the family meeting when the accused person made the confession, never mentioned this in their evidence. When they testified before this court.

27. According to PW9, LUVUNO MBEJA, when the accused person arrived at the scene, he fell on their father's body and sucked blood from the cut on his back. He pulled him off and thought he was confused. He also said that the accused had called their aunt, LEAH JULIUS NYOTA and told him that he was going to kill his father and she had told the deceased about it. He further said that the accused person had confessed to killing their father but explained that he had been asked to do so by his step mother. His evidence was also not corroborated by any other witness and on the issue of confession, the admissibility of it is an issue.

28. PW10, a brother to the deceased and therefore an uncle to the accused person told court that the accused person had told him that he had been involved in his father's death but had been with his younger aunt, Margaret Chidzi Ndegwa (PW10's wife), and his sons Julius Nyota and Mbetsa Mwambondze. That, the following day, he brought the other three suspects to the police station and they also admitted having been involved in the death of the deceased. PW10 said that he was surprised to find that the other three had been released. And when cross-examined, PW10 denied that the accused person confessed and named the people involved in his father's death at the meeting. He said that the accused person called him to the police station and told him of this while in the police cells.

29. PW11, MARGARET CHIDNI NDEGWA told court that the accused person had gone to her home and told her that he wanted to take his father, the deceased for oathing since he had bewitched him, and his children including her children. That she advised him to look for the elders since that was a weighty issue. When cross-examined, she denied that she and her children planned to murder the deceased and that she confessed to it.

30. PW12 testified about the investigations conducted and what led to the arrest and subsequent charging of the accused person. In cross-examination, he denied that PW10 took him PW11 and the children as suspects so he could take action.

31. In his defence, the accused person denied committing the offence and said he was only called and informed of the attack on his father which had led to his death. He said that this had really hurt him.

32. In view of the evidence that was adduced before this court, I find that there is no direct evidence which linked the accused person to the offence. As for circumstantial evidence that was tendered, it was disjointed to the extent of being rendered insufficient to satisfy the standard of proof.

33. I hence find that the prosecution has failed to prove their case against the accused person beyond reasonable doubt and find him NOT GUILTY as charged.

34. I proceed to acquit the accused person under Section 215 of the Penal Code.

Judgment DELIVERED, DATED and SIGNED this 6th day of February, 2019.

D. CHEPKWONY

JUDGE