



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL CASE NO. 46 OF 2014

CYRUS NYENZOACCUSED

VERSUS

REPUBLICSTATE

J U D G M E N T

1. Cyrus Nyenzo (herein referred to as the accused) is 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 31st August, 2014 at Malimili sub location in Kakamega East District within Kakamega County he murdered Erick Muyeshi(herein referred to as the deceased).

2. The prosecution case is that the accused and the deceased were brothers. The deceased was living with his father PW1 at Shiswa village while the accused was staying with his brother, Milton PW2, at Milimili village.

3. That on the material day Milton PW2 was at church when he received a report that the accused and the deceased had fought at his (Milton's) home. He went home. He found the deceased lying in a pool of blood beside his kitchen with severe cut wounds on the head. He found the accused in his (Milton's) bedroom. He had cut wounds. He was in possession of a panga that was blood stained. He removed him out of the house and placed him next to where the deceased was lying. He went and reported at Malaika Police Station. PC Maingi PW6 and other police officers went to the home and picked the two of them. Milton gave PC Maingi the panga recovered from the accused. The accused and the deceased were taken to Kakamega Provincial General Hospital. Upon 20 minutes of arrival at the hospital the deceased died.

4. The area of jurisdiction was under Shinyalu Police Station. PC Maingi PW6 handed over the case to officers from the said police station who conducted investigations. A post mortem was conducted on the body of the deceased by Dr. Asaava PW7. He found the body with a cut on the left palm, long cut wound on the left upper jaw, 5 deep cut wounds covering the whole of the head extending from the scalp bone into the brain matter. The doctor formed the opinion that the cause of death was due to severe open head injury as a result of deep cut wounds due to assault by a sharp object.

5. After police officers completed investigations, the accused was charged with the offence. He denied the charge. During the hearing PC Maingi PW6 produced the panga as exhibit, PEX 1. Dr. Asaava PW7 produced the post mortem report as exhibit , PEX 2.

6. The other witnesses who testified for the prosecution were the parents for both the accused and the deceased -the father PW1 and the mother PW3 (who also testified as PW5 in the case). PW1 stated that he received the report and went to Kakamega Provincial General Hospital where he found the body of the deceased. PW3 testified that she received the report while away from home. That she went home and found the two lying on the ground. Both of them had cut wounds. The deceased had cut wounds on the head and on the neck. The accused had cut on the head, face and hands. Her son Milton reported to the police who came and took the two to hospital.

7. It is Sitati J who heard the evidence of all the witnesses in this case. At the close of the prosecution case, she placed the accused to his defence but the judge went on transfer before she could hear the defence case. When this court took over the matter, it explained the rights of the accused under section 200(3) of the Criminal procedure Code which section gives an accused person the right to select whether to have witnesses who have testified recalled or to proceed from where the case had reached. The accused selected to have the case proceed from where it had reached.

8. The court then proceeded and explained to the accused his rights under section 211(1) of the Criminal Procedure Code and the right to remain silent and not to offer any evidence in the case. The accused opted to remain silent and not to call evidence in the case.

9. The advocates for the accused, **Shibanda Wilunda & Associates** made written submissions. The state did not make any submissions.

10. The advocates for the accused submitted that there is no evidence to link the accused to the death of the deceased. That all the evidence tendered is hearsay evidence. That the fact that Milton PW2 found the deceased in a pool of blood and the accused hiding in his bedroom does not link the accused to the offence of murder. That the deceased could have been attacked by thugs. That there is no evidence as to who

occasioned the injuries on the deceased who could even have fallen onto a sharp object.

Further that the evidence of Milton (PW2) that the accused confessed to him that the two had fought over Sh.20/= is not admissible evidence in proving the charge against the accused.

11. The advocates submitted that the case was full of speculations which cannot aid in proving the case beyond all reasonable doubt. They urged the court to acquit the accused.

Analysis and Determination

12. The offence of murder is defined as follows in section 203 of the penal code:

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

13. This definition gives rise to four crucial ingredients of the offence of murder all four of which the prosecution must prove beyond reasonable doubt in order to prove the charge. These are:

1. The fact of the death of the deceased.
2. The cause of such death.
3. Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused person (actus reus) and lastly
4. That the said unlawful act or omission was committed with malice aforethought (mens rea).

14. The case for the prosecution was based on circumstantial evidence. A case built on circumstantial evidence must satisfy three tests laid in the case of **Abanga alias Onyango Vs Republic, Cr. Appeal No. 32 of 1990(UR)**, that is-

1. *The circumstances from which an interference of guilt is sought to be drawn, must be cogently and firmly established;*
2. *Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;*
3. *The circumstances taken circumstantively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.*

15. The doctor who examined the body of the deceased, Pw7 found it with deep cut wounds on the head extending from the scalp into the bone and the brain. The doctor formed the opinion that the cause of death was severe open head injury due to deep cut wounds. He opined that the injuries were occasioned by a sharp object.

16. PW2 found the accused with a blood stained panga in his (PW2's) bedroom. The deceased was at the time lying outside the home of PW2 with deep cut wounds. The conclusion that the accused is the one who assaulted the deceased is irresistible. The inculpatory fact of being found armed with a blood stained panga near where the deceased was lying injured was a fact incompatible with the accused's innocence and incapable of explanation upon any other reasonable hypothesis than that of guilt. The accused did not offer any defence to these inculpatory facts. There is no doubt that the panga was the murder weapon. The cuts on the deceased were consistent with panga cuts. The submission by the counsel for the accused that the injuries could have been caused by some other reason other than the actions of the accused person such as falling on to a sharp object is, least probable and inconsistent with the evidence in record. There is no doubt that the accused is the person who killed the deceased.

17. The question is whether there was malice aforethought in killing the deceased. Malice aforethought is defined in section 206 as follows:

Malice aforethought shall be deemed to be established by evidence proving anyone or more of the following circumstances-

- a) an intention to caused 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).....

18. The accused inflicted the deceased severe deed cut wounds on the head. The severity of the injuries showed that they were intended to deal a fatal blow to the deceased or were reckless and would likely have caused grievous harm or death. Though the prosecution witnesses said that the accused had some injuries there was no evidence that they were in any way serious. There is nothing to suggest that the accused was acting in self defence.

19. In the foregoing the prosecution has proved beyond all reasonable doubt the charge of murder against the accused. The accused is found guilty of murder contrary to section 203 as read with section 204 of the Penal Code and is convicted accordingly.

Delivered, dated and signed in open court at Kakamega this 11th day of March, 2019.

J. NJAGI

JUDGE

In the presence of :

Miss Wilundafor accused

Mr. Ng'etichfor state

Accused.....present

Court Assistant.....George