



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL CASE NO. 11 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

ANDERSON THOYA CHEA ALIAS KOGAN.....1ST ACCUSED

CHENGO KADHENGI MKAMBA.....2ND ACCUSED

SULUBU KADHENGI MKAMBA.....3RD ACCUSED

JUDGEMENT

1. The 1st accused person, Anderson Thoya Chea alias Kogan, the 2nd accused person, Chengo Kadhengi Mkamba and the 3rd accused person, Sulubu Kadhengi Mkamba are charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge being that on 31st July, 2016 at Kandigani village in Magarini Sub-County within Kilifi County, they jointly with others not before court murdered Nelson Mwachilumo Mrima.

2. PW1 James Zawadi Mwachilumo, PW2 Bendera Chanjera, PW3 Julius Mwadonje Mrima, PW4 Nzingo Munga Konde, PW5 Charo Kazungu Mrima, PW6 Alla Kai Mrima, PW7 Mohamed (not his real name), PW6 Dr. Fadya Swaleh and PW9 Police Constable James Munyes Lokadon testified for the prosecution.

3. The 1st, 2nd and 3rd accused persons testified as DW1, DW2 and DW3 respectively. The 2nd and 3rd accused persons called DW4 Johana Kadhengi Mkamba as their witness whereas DW5 Kazungu Baya Katana testified for the 1st accused person.

4. The prosecution's case is that on 31st July, 2016 Nelson Mwachilumo Mrima (hereafter simply referred to as the deceased) went to inspect his farm and never came back home. It later emerged that he had been hacked to death. The body of the deceased was removed to the mortuary where post-mortem conducted on the body revealed that the cause of death was a deep cut wound on the head exposing the brain matter.

5. Investigations carried out fingered the accused persons with others not before court as the killers of the deceased. They were arrested and charged. The accused persons denied killing the deceased with each accused person claiming to have been far from the scene of crime on the day and time the murder took place.

6. The evidence connecting the accused persons to the crime is that of PW7. The witness told the court that on 31st July, 2016 at around 9.00am he was working in the farm when he heard screams. He decided to go to the source of the noise and that is when he saw somebody being cut. He hid in the bush and saw four people cutting the deceased.

7. He identified the three accused persons in court but did not identify the fourth person. The witness told the court that the 1st accused person cut the deceased on the head, the 2nd accused person cut him on the back, the 3rd accused person cut him on the head whereas the 4th person cut the deceased's hands. The witness told the court that each of the attackers had a panga and the assault took between 5 to 15 minutes.

8. The witness told the court that he could not recall the clothes the attackers wore on the material day. His testimony was that he later ran away from the scene because he feared that the assailants would attack him if he went to the rescue of the deceased.

9. The witness also told the court that the four people ran into the forest after cutting the deceased. PW7 told the court that he went and checked on the body of the deceased and found it sprawled on the ground with cuts on the head and arms.

10. He kept the information to himself but later passed it to PW1 the son of the deceased. The witness told the court that he knew the accused persons prior to the incident. He identified each one of them by name in court. The witness disclosed that his relationship with the accused persons prior to the incident was not good but the prosecution declined to probe the witness for further details stating that doing so would disclose his identity. It is noted that PW7 testified under witness protection.

11. Upon cross-examination the witness insisted that he saw the accused persons kill the deceased and they could not have been elsewhere at the time the deceased was killed. The witness denied testifying so as to cover up an incident in which he had defrauded the deceased. He also denied knowing one Swaleh or knowing that the said Swaleh had defrauded the deceased. The witness stated that he had not received any money from the deceased to be used to purchase property for the deceased and neither had he put Swaleh on a collision cause with the deceased.

12. In his defence, the 1st accused person told the court that on 31st July, 2016 which was a Sunday he went to work up to 4.00pm. He learned that a person had been killed at Katsuoni. He joined people going there. They arrived at the scene at 5.30pm. Police officers later took the body. He attended burial arrangements and the burial of the deceased. One month after the murder he was arrested by police officers at night and charged with the murder of the deceased. He stated that police officers searched his house but did not recover anything.

13. DW5 told the court that the 1st accused person was his cousin and they lived in the same house. The witness told the court that he went to work on 31st July, 2016 and was not with the 1st accused person during the day.

14. The 2nd accused person's testimony was that he left for Garissa on 7th May, 2015 to prospect for minerals and only came back home on 6th August, 2016. He produced a bus ticket as an exhibit. His testimony was that the deceased had already been killed by the time he came back from Garissa.

15. The 2nd accused person also testified that the deceased had disputes with other people. He named Swaleh Abega, Julius Makonje and Ali Mohamed as the people who had disagreements with the deceased. The 2nd accused person further told the court that the deceased's nephew had threatened to kill the deceased.

16. The 3rd accused person told the court he sustained injuries on 26th July, 2016 and was treated at Kambi Ya Waya Health Centre. He produced treatment notes as exhibits. He stated that he could not have killed the deceased as he was sick and on bed rest on the day the deceased was killed. He stated that he had no dispute with the deceased by the time he was killed.

17. DW4 is a brother to the 1st and 2nd accused persons. He testified that the deceased had a land dispute with their family. The deceased sued them in court and the dispute was resolved in their favour. He also stated that the deceased had a land dispute with Swaleh Abed Saidi and Ali Mohamed. His testimony was that the 3rd accused person was injured on 26th July, 2016 and was on bed rest on the day the deceased was killed.

18. The prosecution case on the identity of the killers of the deceased rests on the testimony of PW7. Although an accused can be convicted based on the testimony of a single witness, the court is under an obligation to carefully assess the credibility and reliability of the witness before deciding if it is safe to convict on the basis of that evidence alone. The court should give reasons why it has concluded that the single witness is reliable and trustworthy and it is therefore safe to convict on such evidence.

19. In an appeal arising out of the decision of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, the Appeals Tribunal in a judgment delivered on 19th July, 2010 in the case of **Prosecutor v Ramush Haradinaj & 2 others** held at paragraph 145 that:-

“The Appeals Chamber recalls that a Trial Chamber may enter a conviction on the “basis of a single witness, although such evidence must be assessed with the appropriate caution, and care must be taken to guard against the exercise of an underlying motive on the part of the witness.” The Appeals Chamber further recalls that “a Trial Chamber should at least briefly explain why it accepted the evidence of witnesses who may have had motives or incentives to implicate the accused; in this way, a Trial Chamber shows its cautious assessment of this evidence.” ”

(Citations omitted)

20. In **Abdalla Bin Wendo v Republic [1953] EACA 166** it was held that:-

“Subject to certain well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to the guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.”

21. In **Ogeto v Republic [2004] 2 KLR 14** the Court of Appeal observed at page 19 that:-

“It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with greatest care the identification evidence of such a witness especially when it is shown that conditions favouring a correct identification were difficult – see Marube & another v Republic [1986] KLR 356. Further, the Court, has to bear in mind that it is possible

for a witness to be honest, but to be mistaken – *Kiarie v Republic* (supra).”

22. I will start by registering some discomfiture in the manner in which the testimony of the most crucial witness was handled by the prosecution. PW7 told the court that he reported what he saw to PW1 about a month after the incident. It is therefore presumed that it is the statement of PW7 which led to the arrest of the accused persons. I say so because the charge sheet shows that the accused persons were arrested on 6th September, 2016. In line with the protection of the trial rights of the accused persons, it is expected that their counsel must have been supplied with PW7's witness statement.

23. The order placing PW7 under witness protection was made on 12th July, 2017 meaning the accused persons all along knew who PW7 was. In my view therefore there was no need to conceal the identity of the witness when he testified. If the witness was threatened as alleged by the prosecution then it was simply sufficient to place him under witness protection or even relocate him. Concealing his identity could not serve any purpose unless the defence was not supplied with the statement of this witness or information on his identity was redacted. This, in my view, could only have been done with the leave of the court and the record does not disclose that permission was sought to withhold or redact the statement of this witness.

24. In availing a veiled witness who testified through the court assistant, the prosecution denied this court an opportunity of hearing and seeing the witness as he testified. The court did not therefore have the opportunity of assessing the demeanour of the witness.

25. Having noted the limitations surrounding the testimony of PW7, I now proceed to assess his evidence. PW7 stated that he knew the deceased and the accused persons prior to the incident. He insisted that he knew the accused persons by their names as they lived in the same village. He stated the part of the body of the deceased that each of the four killers cut. His testimony was consistent with the findings in the post-mortem report. The witness never wavered when placed under intense cross-examination by the defence counsel.

26. The witness stated that he observed the happenings from a distance of about 20 metres. It cannot therefore be said that there was mistaken identity.

27. The questions put to the witness by the defence counsel created an impression that the accused persons knew who the witness was. Nothing emerged during the testimony of the witness that can lead this court to the conclusion that he had reason to give false testimony against the accused persons. Indeed the honesty of the witness was enhanced by his concession that he had differences with the accused persons prior to the murder. Although the genesis of the disagreement was not stated, after the prosecutor indicated that pursuing the issue would disclose the identity of the witness, there is no reason to conclude that the disagreement could have made the witness to give false testimony against the accused persons. It is difficult to imagine why the witness would abandon the comfort of normal life and opt for witness protection in order to nail the accused persons if he did not see them kill the deceased.

28. There is also evidence on record that the family of the 2nd and 3rd accused persons had a land dispute with the deceased. PW6 told the court that the dispute was pending in court at the time the deceased was killed. PW6 also disclosed that the deceased had a dispute over the same parcel of land with Swaleh Abed and Ali Mohamed. The 2nd and 3rd accused persons' averment that the land dispute had been settled by the time the deceased was killed is therefore unbelievable. This also confirms that their defence is not truthful.

29. The defence of the 1st accused person was to the effect that he was at work up to 4.00pm on the day the deceased was killed. His witness, DW5, told the court that the 1st accused person did not work on Sundays. The evidence on record is that 31st July, 2016 was a Sunday and the calendar of that year does indeed confirm this fact. DW5 also confirmed that he was not with the 1st accused person during the day on the date of the murder of the deceased. The 1st accused person's defence that he was not at the scene of crime on the material day is therefore discounted.

30. As for the 2nd accused person, his defence is that he was confined to bed having sustained an injury on 26th July, 2016. The treatment notes produced as exhibit does not indicate that the 2nd accused person was put on bed rest. He was within the locality of the murder scene. His defence is found to be without merit and is dismissed.

31. The 3rd accused person's defence is that he was at Garissa on the day the deceased was killed. He produced a bus ticket showing that he travelled from Garissa on 6th August, 2016. He, however, did not produce a bus ticket to show when he left for Garissa. In view of the positive identification by PW7, I find that the 3rd accused person was among the four people who killed the deceased on the material day.

32. The Court of Appeal in **Athuman Salim Athuman v Republic [2016] eKLR; Criminal Appeal No. 44 of 2015 (Mombasa)** stated the applicable law where an accused raises the defence of alibi as follows:-

“It is trite that by setting up an alibi defence, the appellant did not assume the burden of proving its truth, so as to raise a doubt in the prosecution case. (*SSENTALE V. UGANDA* [1968] EA 365). The burden to disprove the alibi and prove the appellant's guilt lay throughout on the prosecution (*WANG'OMBE V. REPUBLIC* [1976-80] 1 KLR 1683). As was stated in *R. V. CHEMULON WERO OLANGO* (1937) 4 EACA 46, the purpose of the defence of alibi is to account for so much of the time of the transaction in question as to render it impossible for the accused person to have committed the imputed act.

It is not in dispute that the appellant raised what he calls his alibi defence for the first time in his unsworn statement of defence. Even then he merely stated that he left for his rural home on 1st September 2011, without stating whether he remained there as of 2nd September 2011 when the offence was committed at Kombani Market. Since his defence was an unsworn statement, the prosecution was not able to cross-examine him to clarify or otherwise impeach the alibi defence. To the extent that an alibi defence can be implicit, and the appellant bears no burden of proving his alibi, he is entitled to the benefit of the doubt and we shall therefore take it that he had indeed raised an alibi defence.

The principle has long been accepted that an accused person who wishes to rely on a defence of alibi must raise it at the earliest opportunity to afford the prosecution an opportunity to investigate the truth or otherwise of the alibi. Way back in 1939 in *R. V. SUKHA SINGH S/O WAZIR SINGH & OTHERS* (1939) 6 EACA 145, the former Court of Appeal for Eastern Africa upheld the decision of the High Court in which it was stated:

"If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped".

(See also *R. V. AHMED BIN ABDUL HAFID* (1934) 1 EACA 76 and *WANG'OMBE V. REPUBLIC* [1976-80] 1 KLR 1683).

The Supreme Court of Uganda, in *FESTO ANDROA ASENUA V. UGANDA*, CR. APP NO 1 OF 1998 made a similar observation when it stated:

"We should point out that in our experience in Criminal proceedings in this Country it is the tendency for accused persons to raise some sort of alibi always belatedly when such accused persons give evidence. At that stage the most the prosecution can do is to seek adjournment of the hearing of the case and investigate the alibi. But that may be too late. Although for the time being there is no statutory requirement for an accused person to disclose his case prior to presentation of his defence at the trial, or any prohibition of belated disclosure as in the UK statute cited above, such belated disclosure must go to the credibility of the defence."

Although the appellant in this case put forth his alibi defence rather late in the trial, we cannot agree with counsel for the respondent that the alibi defence must be ignored. That defence must still be considered against the evidence adduced by the prosecution. Indeed in *GANZI & 2 OTHERS V. REPUBLIC* [2005] 1 KLR 52, this Court stated that where the defence of alibi is raised for the first time in the appellant's defence and not when he pleaded to the charge, the correct approach is for the trial court to weigh the defence of alibi against the prosecution evidence. In the circumstances of this appeal, we are satisfied that when weighed against the evidence of his identification at the scene which we now turn to consider, the appellant's alibi defence was completely displaced."

33. Although each accused person raised an alibi defence the same came late in the date and the prosecution was never given an opportunity to rebut the same. I have nevertheless considered the alibi defence of each accused person and find that the same cannot be believed.

34. Even with the constraints I have identified in respect to the testimony of PW7, I nevertheless arrive at the conclusion that PW7 was a truthfully and honest witness. Although he admitted to having differences with the accused persons, there is nothing to show that his disagreements with the accused persons could have motivated him to come forward and tell lies against them. It appears that his interest was to solely ensure that justice is done in this case.

35. In the circumstances, I am satisfied by the prosecution beyond reasonable doubt that the accused persons, jointly with another not before court, with malice aforethought, caused the death of the deceased. I therefore find each accused person guilty of murder as charged and each accused person is convicted accordingly.

Dated and Signed at Nairobi this 25th day of April, 2019

W. Korir,

Judge of the High Court

Dated, Countersigned and Delivered at Malindi this 13th day of June, 2019

R. Nyakundi,

Judge of the High Court