



REPUBLIC OF KENYA

HIGH COURT OF KENYA

AT MALINDI

CRIMINAL CASE NO. 19 OF 2016

REPUBLIC.....PROSECUTION

VERSUS

SAMSON KATANA MURAMBA.....ACCUSED

JUDGEMENT

1. Samson Katana Muramba, the accused person, faces a charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence, as per the information dated 8th December, 2016, alleges that on 14th November, 2016 at Kwa Pendukiani Village, Msabaha Sub-Location, Ganda Location, Malindi Sub-County within Kilifi County the accused, jointly with others not before court, murdered Katana Mugunya Bakari.

2. The accused person pleaded not guilty to the information on 19th December, 2016. The prosecution called eight witnesses in support of their case. They are PW1 Annah Neema Siro, PW2 Samwel Fondo, PW3 Dr. Fadya Swaleh, PW4 Sidi Muramba, PW5 Shutu Wamange, PW6 AP Sgt Keneth Shida Katana, PW7 APC Ibrahim Elema and PW8 Police Constable John Mayani. The accused person testified in his defence as DW1.

3. The evidence of two prosecution witnesses will outline the prosecution's case. PW1 Annah Neema Siro is the Assistant Chief of Msabaha Sub-Location. Her testimony was that on 14th November, 2016 she was in her office carrying out her duties when the accused person and his brother Charo Katana went and asked her to serve them with some urgency. They reported to her that the previous night their father had burned their house and they were going to kill him. She told them to go and report the matter to the police but they refused to do so. They left her office running and looking annoyed.

4. PW1 told the court that after the two left, she decided to alert a village elder by the name James and told him to go to their homestead. After about ten minutes James called her back and informed her that the two men were beating their father like a snake.

5. PW1 telephoned PW6 of Kizingo Police Post and together they proceeded to the scene where they found many people had surrounded the homestead. They were told that the victim was locked up in one of the houses. They broke the door and found an old man bleeding from the nose and shivering. They placed him in the police car and since no relative wanted to accompany him to hospital, a 'Nyumba Kumi' elder went with them. PW1 was left at her office as the rest proceeded to hospital. The following day the village elder called James telephoned her and informed her that the old man had passed away.

6. It was PW1's testimony that she knew the accused person and his brother prior to the incident. She testified that the accused and his brother were not present when they arrived at the scene. Her testimony was that immediately after she received the news of the death of the victim, the accused person went to her office and told her to assist him as his father had been killed and he did not know what to do. She informed him the issue was now beyond her as the matter was already with higher authorities.

7. Upon cross-examination, PW1 told the court that she knew the deceased and some of his children. Among the children she knew was the accused person, Charo and Sidi. PW1 denied writing any letter for the accused person and his brother on 14th November, 2016 although in her witness statement she had indicated that she gave them a letter to take to the police to report their complaint.

8. PW1 also stated that on 15th November, 2016 the accused person went to her house in the company of a village elder called Samuel Fondo.

9. PW1 further told the court during cross-examination that the village elder by the name James had telephoned her and told her that the children of the deceased were beating him. The witness stated that another man called Brazil had also reported the assault to her but admitted that she did not record this fact in her witness statement. She insisted that the accused person was not present when they arrived at

the scene. She concluded her testimony by stating that prior to the incident the accused person had gone to her office seeking bursary.

10. PW4 Sidi Muramba, a sister to the accused person, told the court that on 14th November, 2016 at about 3.00am she was awoken from her sleep by the quarrelling of her deceased father and her brother Charo. The quarrel was about a bicycle which Charo wanted to take. At daybreak, Charo left for Gede. It was then that their deceased father burned Charo's house. They raised alarm and people came and put out the fire.

11. PW4's testimony was that Charo came back with the accused person at about 3.00pm and they started war against the deceased. When she emerged from the house, Charo told her to leave as they did not want any witness. She went and stood not far from their home and raised alarm. People who responded to her alarm were chased away by the accused person as Charo continued beating the deceased. They then put the deceased inside a house within their homestead.

12. It was PW4's evidence that a village elder called Fondo was alerted and he came to the scene with police officers. By that time the accused person and Charo had disappeared. As the deceased was removed from the house, she noticed that he was bleeding from the mouth, nose and ears. Her testimony was that the accused person and Charo came back at midnight. She identified the accused person in court as the person who, together with Charo, beat up the deceased. Her evidence was that Charo had disappeared after the incident and had not come back home by the time she was testifying.

13. In response to questions put to her during cross-examination by counsel for the accused person, PW4 told the court that she was present when the accused person arrived with Charo. She heard them beat the deceased and she went out and raised an alarm. According to her, many people including Fondo came to see what was happening. Her testimony was that the accused person and Charo locked the deceased in a house.

14. PW4 further testified that she urged the people who came to rescue her father, but the accused person chased them away. Her testimony was that none of the people who responded to her alarm joined her brothers in beating the deceased.

15. In his defence the accused person denied assaulting the deceased. He told the court that even though schools were closed, he was at his place of work at Msabaha Primary School as the teacher on duty on the material day. He was supervising pupils who were carrying out a cleaning exercise at the school. At about 2.00pm he received a call from his wife who told him to urgently go home as there was war and his father was likely to be killed. He quickly locked the staffroom and handed over the key to the school watchman one Shono Buko.

16. The accused person testified that when he arrived at his home which is about one kilometer from his place of work he found a large crowd of people. He heard the people say **"remove him so that we can finish him."** On entering the compound he found his three uncles and PW2 Samuel Fondo standing outside his father's house. He asked PW2 what was happening and PW2 told him **"look at the burned house of your brother Charo. It is your father who burned it."** PW2 went ahead and told him that they had rescued his father from the mob and locked him in the house for his safety. He also informed him that they had called police officers.

17. The accused person told the court that at about 2.40pm a police motor vehicle arrived and the people took off in different directions. PW1 and PW6 alighted and asked for the injured man. PW2 told them he had been locked in the house for his own safety. PW2 then unbolted the door.

18. It was the accused person's testimony that he entered the house with PW2 and they carried the deceased to the police vehicle. He boarded the vehicle with PW1, PW2, PW6 and PW7. PW1 alighted at Msabaha trading centre. They continued with the rest up to Malindi Police Station where PW6 and PW7 handed them over to police officers at Malindi Police Station. From there, they were accompanied by PW8 to Malindi Sub-County Hospital where their father was admitted.

19. They later left their mother (PW5) at the hospital with the deceased and went to Malindi Police Station with PW2 where they were told to go back the next day because the OCS was not present. They went back to the hospital and later proceeded home after observing that the deceased was receiving treatment.

20. The accused person testified that the following day he again proceeded to the hospital with PW2 before going to Malindi Police Station where they found the OCS. According to the accused person, PW2 started explaining to the OCS what had happened and it was then that the OCS asked him (the accused person) if he knew Charo. He told the OCS that Charo was his brother. It was then that the OCS told him to tell him where Charo was otherwise he would be implicated in the incident. It was the testimony of the accused person that he told the OCS that he did not know where Charo was and he could not look for Charo. The OCS slapped him and locked him in the cells.

21. Concerning the testimony of PW4, the accused person told the court that he had differences with her after she left her matrimonial home and came back home. He did not want her to get more children but a month prior to the killing of their father he had seen a man emerge from his sister's house. He told her not to despise them and informed her that he was no longer going to pay fees for her children. She threatened him and when their father was killed she took advantage of the situation in order to fix him.

22. Cross-examined by the prosecutor, the accused person told the court that he could not call the school watchman as a witness because the watchman was deceased. He admitted that he had not produced any document to show that he was on duty on the material day.

23. Asked why PW1 would give false testimony against him, the accused person stated that there was a time she had reported PW4 to PW1 but he (the accused person) failed to pay a fee of Kshs.600 which was normally paid and PW1 became annoyed with him. The accused person stressed that his sister who testified as PW4 was looking for any chance to fix him.

24. In respect of the offence of murder, the prosecution must prove beyond reasonable doubt the death of a person caused by an unlawful act of the accused. There is also need for the prosecution to establish that the accused had malice aforethought.

25. It is not disputed that Katana Mugunya Bakari died as a result of injuries inflicted by a human hand. PW3 produced a post-mortem form filled by Dr. Omenda George. Dr. Omenda George carried out post-mortem on the body of the deceased and concluded that the cause of death was cervical spine fracture complicated by hemorrhage from deep lacerations.

26. The only remaining issues are whether it has been proved that it is the accused person who inflicted the injuries on the deceased, and, if so, whether he had malice aforethought.

27. The accused person denied being present when the injuries were inflicted on the deceased. Indeed he has painted himself as a good son who did all that could be done to save the life of his father after he was attacked by a mob. Is his defence believable?

28. The accused person has raised an alibi defence. He says he could not have committed the offence because he was not at the scene of crime at the time the deceased was attacked. 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. (*SENTALE 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.”

29. I will apply the stated law to this case. The accused person’s case is that all the key witnesses have told lies against him. The claim by the accused person that he was not present when injuries were inflicted on the deceased cannot be believed. From the outset it must be observed that he only brought forward the alibi defence at the defence stage thus denying the prosecution an opportunity to rebut it. Nevertheless, this court has a duty to consider the said defence.

30. The evidence of PW4 squarely put the accused person at the scene of crime. The evidence of this witness was not shaken during cross-examination. She came across as a forthright person. It is important to note that when this witness testified she was never asked about the differences the accused person claimed to have had with her.

31. The testimony of PW4 was supported by that of PW1 who told the court that immediately prior to the incident the accused person had gone to her office with his brother Charo. They were agitated and told her that they were going to kill their father for burning Charo’s house.

They also claimed that their father used to walk naked at night.

32. The accused person gave the impression that PW2 Samuel Fondo was with him up to the time he was arrested. PW2 told the court that the accused person was not at home. This upsets the accused person's claim that he was among the people who took the deceased to hospital. The accused person's claim that he left the deceased alive at the hospital on 14th November, 2016 cannot be believed considering that when PW2 went to check on the deceased on 15th November, 2016 at 6.00am the doctor told them that the deceased had passed away on arrival at the hospital.

33. Indeed the mother of the accused person, PW5 Shutu Wamange confirmed that immediately after receiving information that the deceased had been attacked she proceeded to Malindi Sub-County Hospital where she found the deceased had passed away. The accused person's claim that he accompanied the deceased to the hospital on 14th November, 2016 and left him while being treated is therefore not true. This confirms that he was not among those who took the deceased to hospital as he had disappeared as stated by PW4. PW2 confirmed that he knew the accused person very well and he was not at home when he found the deceased beaten and locked up in a house.

34. I therefore find that PW4 told the truth. The accused person and his brother Charo are the ones who attacked the deceased. She saw the accused person assault the deceased using firewood. When members of the public attempted to rescue the deceased it was the accused person who chased them away. PW4 stated that no member of the public attacked the deceased. I therefore find that the deceased died as a result of injuries inflicted on him by the accused person and another.

35. Counsel for the accused person, through the written submissions filed on 14th February, 2019, urged this court to find that malice aforethought was not established. He submitted that the deceased burned down the house of Charo while Charo was away at Gede. When Charo and the accused person came home they found the house burned and started fighting with the deceased.

36. Counsel for the accused person submitted that the accused person ought to have been charged with manslaughter. He cited the decision of the Court of Appeal in **Juma Onyango Ibrahim v Republic [2013] eKLR, Criminal Appeal No. 312 of 2009 (Kisumu)** where it was held that:-

“In the circumstances of the case where there was a fight involving the appellant and others in a place of worship leading to another fight moments later where the appellant stabbed the deceased with fatal consequences we do not think there was malice aforethought at all. The appellant should not have been convicted for murder but should have been convicted for manslaughter.”

37. Counsel for the accused person has a point. In the case before me, PW4 who was the only eyewitness to the assault on the deceased stated that:-

“They were fighting with firewood that was nearby.”

38. It appears that there was some altercation and this is very possible considering that it is the deceased who burned Charo's house in what appeared to be an attempt to evict him from the homestead. I therefore agree with the accused person's counsel that the offence proved is not murder but the lesser charge of manslaughter. In the circumstances I find the accused person guilty of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code and I convict him accordingly.

Dated and Signed at Nairobi this 2nd day of May, 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