



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL CASE NO. 40 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

FESTUS MUKHWANA.....ACCUSED

JUDGMENT

1. 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 20th January, 2011 at Sango Chebwai Sub-location in Kakamega North District within Western Province jointly with another not before court murdered Abel Namasaka (herein referred as the deceased).

2. The case for the prosecution was that the deceased was a brother to Fanuel Kasembeli PW1, Edward Bushuru PW2 and Caleb Bushuru PW3. The three were neighbours with the deceased. That on the material day at 8-9 p.m. the three brothers PW1, 2 and 3 were at their respective homes when they heard screams at the home of the deceased. They responded to the screams. Edward PW2 was the first to get there. He found two people outside the house of the deceased. He identified them as his co-villagers, Timothy Muchesi and Moses Muchesi. The two had a bicycle. They took the bicycle and ran away. He saw the deceased fighting with Mukhwana, the accused, inside the deceased's house. The accused also ran away.

3. Caleb PW3 and Fanuel PW1 then reached there. The deceased was bleeding from the mouth and nose. He told them that it is Mukhwana (the accused), Timothy and Moses who had attacked him. He said that the accused had hit him with a stick on the head. They took him to the local Administration Police Camp where he mentioned the names of the three people to the Aps. They started to take the deceased to hospital. He died. They made the report at the AP Camp. Policemen from Kabras Police Station were called. They went and took the body to Kakamega Provincial General Hospital.

4. On the 21/1/2011 Dr. Muchana PW4 conducted a postmortem on the body. He found it with an irregular cut wound on the scalp measuring 1.5 cm with large blood clot on the right scalp and over the brain cover. He formed the opinion that the cause of death was head injury following assault.

5. The appellant was arrested in October, 2012 after he emerged from hiding and was charged with the offence. During the hearing Dr. Muchana produced the postmortem report as exhibit, P.Exh.1. The investigating officer and those who arrested the accused did not turn up to testify in the case.

6. When placed to his defence the accused gave a sworn statement in which he stated that before he was arrested he was a farmer and a trader. That the deceased was his neighbour. That on the 20/1/2011 he was at his home at 8 p.m. when he heard people screaming. He and other people went to the scene and found the deceased having been attacked by some unknown people. Later in October 2012 he was arrested and charged with the offence. He denied that he committed the offence. He did not call any witness in the case.

7. The accused further stated that he had been at his home after 20/1/2011 and never escaped.

8. It was the evidence of Edward PW2 that his home is about 300 m from the home of the deceased. That he heard the deceased screaming and calling at his name. He went to the home of the deceased. He found Timothy Muchesi and Moses Muchesi outside the home. He saw Festus, the accused, fighting with the deceased inside the house of the deceased. Timothy and Moses had a bicycle. They took the bicycle and ran away. His brothers arrived. They found the deceased bleeding. He told them that the accused had hit him with a stick on the head. They took him to the AP Camp at Sango Market. The deceased gave his report that he had been beaten by the accused and Timothy. He had not identified Moses who had been outside.

9. The witness said that the accused came out of the deceased's house. That there was a tin lamp on inside the house. That he was wearing a track suit. That there was moonlight and that he was about 3-4 metres away from him.

10. Caleb PW3 testified that he was at home when he heard screams from the home of the deceased. That he went there and saw some

people running away but he did not identify them. He went to the deceased who was saying that Mukhwana was killing him. He was bleeding from the mouth and nose. He told them that it is Mukhwana, Moses and Timothy who had hit him on the head. They started to take him to the AP Camp. On the way they saw Moses and Timothy. Timothy ran away. They went with Moses to the AP Camp. He had a bicycle on which there was a rungu. At the camp the deceased gave out the names of the three people. They left Moses at the AP Camp. They were to take the deceased to hospital on the following day but he died.

11. Fanuel PW1 testified that he heard the deceased screaming while mentioning the names of Festus (the accused), Timothy and Musa. He went to the home of the deceased. He did not find the assailants there. The deceased told them that the said people had beaten him. He was bleeding from the mouth, nose and ears. They took him to the AP Camp. He gave the names of the three people to the Administration policemen. He died when they were taking him to hospital. The witness said that it was a dark night.

Submissions –

12. The advocates for the accused, **K. N. Wesutsa & Co. Advocates**, submitted that it is only Edward PW2 who claimed to have identified the accused. However that he did not give the intensity of the light of the moon and the tin lamp. That Fanuel PW1 and Caleb PW3 did not mention the presence of moonlight on that night. That the testimony of Edward (PW2) is that of a single witness that should be taken with a lot of caution. That the policemen to whom the report was made at Sango AP Camp did not testify in the case. That the allegation that the accused was mentioned to the police was not proved.

13. The prosecution counsel did not make any submissions in the case.

Analysis and Determination –

14. 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.”

This definition gives rise to four crucial ingredients of the offence which are:-

“(a) The fact of the death of the deceased.

(b) The cause of such death.

(c) Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons,

(d) Proof that said unlawful act or omission was committed with malice aforethought.” See **Anthony Ndegwa Ngari –Vs- Republic (2014) eKLR.**

15. The death of the deceased was proved by the witnesses PW1, 2 and 3 who saw the deceased’s body with a deep cut wound on the head and by the post mortem report of Dr. Muchana PW4 who examined the body and confirmed the said injury and formed the opinion that the cause of death was as a result of the said injury following assault. There is thereby no doubt that the deceased died as a result of assault.

16. Malice aforethought is defined deemed to be established by evidence when any of the following circumstances as set out in Section 206 of the Penal Code are proved:-

“a)An intention to cause the 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 intention to commit a felony.

d)An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

In **Republic -Vs- Silas Magongo Onzere Alias Fredrick Namema (2017) eKLR** the court held the following as to what amounts to malice aforethought:-

“The state through the prosecution must establish facts that are consistent with existence of malice aforethought on the part of the accused. This leads to the question when can a court infer malice aforethought in the crime of murder?

The Eastern Court of Appeal favoured this approach in the case of Republic v Tubere S/O Ochen [1945] 12 EACA 63. The court held and acknowledged that in determining whether malice aforethought has been established the following elements should be considered:

(1) The nature of the weapon used.

(2) The manner in which it was used.

(3) The part of the body targeted.

(4) The nature of the injuries inflicted either a single stab/wound or multiple injuries.

(5) The conduct of the accused before, during and after the incident.

17. The deceased herein was hit on the head. The blow was so heavy that he died in a few hours time after the assault. The attacker thereby intended to cause death or grievous harm to the deceased. Malice aforethought was thereby established.

18. Edward PW2 told the court that he identified the accused as the person who was fighting with the deceased inside the house of the deceased. He further said that the deceased told him that the accused had hit him with a stick on the head. That at the police post he said that it is the accused and Timothy who had attacked him.

19. The incident took place at night. The question is whether Edward identified the accused as the person who attacked the deceased inside his house.

20. Edward said that there was moonlight. Caleb PW3 however said that it was a dark night.

21. It is settled law that in situations where identification is alleged to have taken place in difficult circumstances the evidence on identification has to be considered carefully so as for the court to satisfy itself that the identification was free from any possibility of error. This was succinctly put by the Court of Appeal in **Cleophas Otieno Wamunga –Vs- Republic (1989) eKLR** where it was held that:-

“We now turn to the more troublesome part of this appeal, namely the appellant’s conviction on counts 1 and 2 charging him with the robbery of Indakwa (PW1) and Lilian Adhiambo Wagude (PW3). Both these witnesses testified that they recognized the appellant among the robbers who attacked and robbed them..... What we have to decide now is whether that evidence was reliable and free from possibility of error so as to find a secure basis for the conviction of the appellant. Evidence of visual identification in criminal cases can bring about a miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleged to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach the evidence of visual identification was succinctly stated by Lord Widgery, CJ in the well known case of R vs Turnbull [1976]3 All ER 549 at page 552 where he said:-

‘Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.’”

22. Edward PW2 was a single identifying witness in the case. It is settled law that evidence of a single identifying witness ought to be tested with great care to avoid convicting an accused person on the evidence of mistaken identity. In **Matianyi –Vs- Republic (1986) 2KLR 75** the Court of Appeal held that:-

“1. Although it is trite law that a fact may be proved by the testimony of a single witness, this 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.

2. When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available, conditions and whether the witness was able to make a true impression and description.

3. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision. It must do so when the evidence is being considered and before the decision is made.”

23. The court in the same case said the following in regard to evidence of identification:-

“... It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care.”

24. Edward said that he identified the appellant by aid of a tin lamp light that was on inside the deceased’s house. That the accused ran out of the house and that he was about 3-4 m away from him. That there was moonlight. However the witness did not clarify as to whether the distance of 3-4 m was the distance that the accused was away from him when he (the accused) was inside the house or when the accused ran out of the house. If the witness identified the accused when he was inside the deceased’s house it was not explained how the witness was able to identify the accused when the accused was inside the house and the witness was outside the house. It was not explained whether the door to the house was open or closed. It was not explained where the tin lamp was and the distance at which the witness was from the

house. Neither was it explained which part of the body that the witness saw that enabled him to identify the accused. The intensity of the tin lamp light was not stated. On the other hand if the witness identified the accused when he was running out of the house Caleb PW3 said that it was a dark night. Edward therefore could not have identified the accused by aid of moonlight as Caleb PW3 discounted the evidence of Edward that there was moonlight. In view of the foregoing there was no sufficient evidence that Edward identified the appellant beyond all reasonable doubt. Being the only identifying witness in the case his evidence is to be taken with a lot of caution as he might have been mistaken on the identity of the person that he saw.

25. The deceased is reported to have made a dying declaration to his brothers that it is the accused, Timothy and Moses who had attacked him. Edward PW2 however stated that the deceased did not mention Moses. The Court of Appeal in **Moses Wanjala Ngaira –Vs- Republic (2019) eKLR** held the following on the evidence of dying declaration:-

“[26] In Philip Nzaka Watu vs Republic [2016] eKLR, this Court stated the following on admission and reliance on a dying declaration:

“Under section 33(a) of the Evidence Act, a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Under that provision, statements of admissible facts, oral or written, made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death, or as to any of the circumstances of the transaction leading to his death. Such statements are admissible whether the person who made them was or was not expecting death when he made the statements. While it is not the rule of law that a dying declaration must be corroborated to found a conviction, nevertheless, the trial court must proceed with caution and (sic) to get the necessary assurance that a conviction founded on a death declaration is indeed safe.”

26. It is necessary for evidence of a dying declaration to be corroborated in some material particulars. In **Charles Njonjo Gituro –Vs- Republic (2019) eKLR** the Court of Appeal held that:-

“It is not a rule of law that, in order to support a conviction there must be corroboration of a dying declaration and there may be circumstances which go to show that the deceased could not have been mistaken in his identification of the accused. But it is, generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person, made in the absence of the accused and not subject of cross-examination, unless there is satisfactory corroboration.”

27. Both Fanuel PW1 and Caleb PW3 said that the deceased mentioned the accused, Timothy and Moses. Edward PW2 however stated that the deceased mentioned the accused (Mukhwana) and Timothy but did not mention Moses. So how many people did the deceased mention?

28. It is my finding that there is no sufficient evidence on identification of the accused. There is no sufficient evidence to corroborate the dying declaration of the deceased that the accused was among the people who attacked him. It would be unsafe to base the conviction of a dying declaration of the deceased. The prosecution has not proved the charge against the accused beyond reasonable doubt. The upshot is that the accused is found not guilty of the offence of murder and is acquitted accordingly.

Delivered, dated and signed in open court at Kakamega this 23rd day of July, 2019.

J. NJAGI

JUDGE

In the presence of:

No appearance for accused

Miss Omondi for state

Accused - present

Court Assistant - George

14 days right of appeal.