



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL CASE NO 24 OF 2011

REPUBLIC.....PROSECUTION

VERSUS

BONFACE NASHALI.....ACCUSED

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Introduction

1. The Accused herein Boniface Nashali with two others, on the 24th May 2011 appeared before Kimaru J and pleaded not guilty to a charge of *murder contrary to section 203 as read with section 204 of the Penal Code*, the particulars of which are that on the 8th April 2011 at Shiswa Sub-location Murhanda location in Kakamega East District within western Province, they murdered Charles Khangati.

2. Following the plea of not guilty, the prosecution called 5 witnesses in support of the charge against the accused person.

Prosecution case

3. The prosecution called 5 witnesses to testify. Saul Masiza PW1 (Saul), Wycliffe Mukhanji PW2 (Wycliffe), Dr Dickson Mchana PW3 (Dr. Mchana), Ambani Okwemba Zablon PW4 (Okwemba) and Number 97085423APC Philip Kirwa PW5 (APC Kirwa).

4. Saul testified that on the 8th April 2011, the deceased's body was found on a pathway next to one Isanya's home and that there were trails of blood on the ground showing that the body had been dragged on the ground leading to Isanya's house. When the said Isanya was questioned over the death of the deceased he asked his questioners to call the accused. The accused was called to the scene so were the police and he led them to where he had allegedly hidden a club that had been used to beat the deceased to death. Isanya, the accused and a girl at the home of Isanya were later arrested and taken to the police station. The body of the deceased was taken to Kakamega Provincial Hospital Mortuary pending postmortem examination.

5. Wycliffe testified that he was informed that the deceased was dead and that his body had been spotted near Isanya's house. He stated that the said Isanya informed him that the deceased had gone to drink alcohol with the accused and two others and that they had left together.

6. Dr. Mchana who testified as PW3 performed the postmortem examination on the body of the deceased at the Kakamega PGH on 13th April 2011 after the deceased's body was identified to him by Elizabeth and Ambani, a brother to the deceased. Ambani was PW4.

7. From the examination, Dr. Mchana observed that the deceased suffered defence injuries on his upper limbs, a fractured neck, superficial bruises on top of the skull, a chronic wound on the right leg, bruising of the chest muscles internally and bleeding in coverings of the brain over the back with no tear. He stated that the neck fracture involved the 2nd and 3rd bones and that there was bruising on the spinal code at the neck level. Dr. Mchana was of the opinion that the cause of death was severe head and spinal (neck) injuries secondary to blunt trauma following assault. The postmortem report was produced as Pexh.1.

8. APC Kirwa, the arresting officer testified that he accompanied other APs to make the arrest. He stated that he remained in the vehicle while his colleagues made the arrest. In cross examination he stated that he was told by the members of the public that the Accused person was the one who hit the deceased.

Defence case

9. By a ruling dated 22nd July 2015 the accused was found to have a case to answer and accordingly put on his defence. The accused testified that on the date of the alleged incident he had gone to the house of Jafred Isanya (a drinking den) to take alcohol (chang'aa). He stated that he drank alcohol and left at 12.30pm. He clarified that he left the deceased with other customers drinking and that he was arrested the next day on allegations that he had killed the deceased. He stated that the said Jafred Isanya passed on during trial. In cross examination he confirmed that he was with the deceased at the drinking den and that the deceased did not look too drunk. He denied beating the deceased. He testified further that he had a grudge with Saul and that at no time did he hit the deceased with a rungu.

Submissions

10. The state did not submit. The Accused on his part submitted that the evidence adduced by the prosecution did not support the charge especially on the elements of *mens-rea* and *actus reus*.

Burden of proof

11. It is trite that the burden of proof in criminal cases rests entirely on the prosecution and the burden never shifts. The accused has no burden to prove his innocence. He is presumed innocent until proved guilty. Whether the defence was a mere denial or that the offence is very serious does not and can never shift the burden on him. See **Republic V Stanley Muthike Tiire [2018] eKLR** in which the court expressed itself thus on the issue:-

“It is the law in Kenya as entrenched in the Constitution under Article 50 (2) (a) that an accused person is presumed to be innocent until the contrary is proved. The Evidence Act Cap 80 of the Laws of Kenya at section 107 (1) provides thus: “Whoever desires any court to give judgment as to any right or liability dependent on the existence of facts which he asserts, must prove those facts exist.”

As to what constitutes the burden of proof beyond reasonable doubt the case of Miller v Minister of Pensions [1947] 2 ALL ER 372 – 373 provides as follows in a passage alluded to be considered the greatest jurist of our time Lord Denning:

“That degree is well settled. It needs not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility of his favour which can be dismissed with the sentence of course it is doubt but nothing short of that will suffice.”

In our criminal justice system there is no duty on the accused to prove anything on the allegations of a criminal nature filed by the state in a court of law. That burden of proof of an accused's guilt rests solely on the prosecution throughout the trial save where there are admissions by the accused person.”

12. I entirely agree with the above propositions

Issues for determination

13. The offence of murder is defined as follows by **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.”

14. This definition gives rise to four (4) crucial ingredients of the offence of murder all of which the prosecution must prove beyond reasonable doubt in order to prove the charge. These 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 person.
- d) Proof that the said unlawful act or omission was committed with malice aforethought.

For these ingredients, See **Anthony Ndegwa Ngari – versus – Republic [2014]eKLR**

Analysis and Determination

a) Whether the death of the deceased occurred.

15. The death of the deceased has been proved by all the witnesses who saw the deceased's body and confirmed by the postmortem report which was produced as PEXH. 1. Dr. Mchana testified that the deceased died due to severe head and spinal (neck) injuries secondary to blunt trauma following assault.

b) Whether there was Proof that accused committed the unlawful act which caused the death of the deceased.

16. The Prosecution called five witness to testify on its behalf. There was no eye witness account to the events that led to the death of the deceased. The only available evidence is therefore circumstantial evidence.

17. In the case of **Republic V Silas Magongo Onzere Alias Fredrick Namema [2017] eKLR** the court stated that:-

“Death of a human being is unlawful when it is caused by another in circumstances which are not authorized or permitted by law. (See the principle in the case of Guzambizi S/O Wesonga v Republic [1948] 15 EACA 65). This legal proposition is consistent with Article 26 of our Constitution which provides for the right to life for every person. The justified exceptions the law recognizes is in execution of a court sentence, for the defence of property or defence of the life of self or any person from unlawful violence.

The prosecution therefore has a duty to prove that the accused person caused the death of the deceased in this case through unlawful acts. Proving the cause of death in Kenya may either be through direct or circumstantial evidence. The circumstances which the court will hold an accused person liable for the death of another are provided for under section 213 of the Penal Code (Cap 63 of the Laws of Kenya).

“It is trite law as espoused in the case of Joan Chebichii Sawe v Republic [2003] eKLR that “before a court of law can convict a person/accused upon circumstantial evidence, such evidence must be where the inference of guilt, the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. That such evidence must be so mathematically accurate as a basis of conviction in exclusion of any other co-existing circumstances weakening the chain of circumstances relied on by the prosecution. These principles articulate the position in law that the question as to the cause of death may either be answered by way of medical or circumstantial evidence.”

18. In the case of **Anne Waithera Macharia & 5 Others V Republic [2019] eKLR** the Court of Appeal observed that

“The law of circumstantial evidence is quite settled. In MWITA vs. REPUBLIC [2004] 2KLR 60 it was stated thus by this Court;

“It is trite that (sic) in a case depending exclusively upon circumstantial evidence the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt; see Simon Musoke v Republic [1958] EA 715 where the following extract from Teper v R [1952] AC 480, 489, was quoted [1958] EA at page 719:-

“It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”

The circumstantial evidence needs to form a chain so complete as to lead unerringly to the conclusion that the accused is guilty of the offence and that the said evidence is incapable of any other reasonable hypotheses than that of guilt. See also REX vs. KIPKERING ARAP KOSKE & ANOR [1949] 16 EACA 135; SANE vs. REPUBLIC [2007] KLR and ODONGO vs. REPUBLIC [2009] KLR 261.”

From the foregoing, the only issue that falls for our determination is whether the circumstantial evidence on record was sufficient to support conviction. However, there is no requirement in law that the guilt of a person must be proved by direct evidence alone.

Circumstantial evidence can also sufficiently buttress the establishment of the guilt of an accused person as was held in the case of Musili Tulo V. Republic Criminal Appeal No. 30 of 2013, where this Court pronounced itself as follows:-

“Circumstantial evidence is as good as any evidence if it is properly evaluated and, as is usually put, it can prove a case with the accuracy of mathematics.”

19. In **Sylvester Mwacharo Mwakeduo & Another V Republic [2019] Eklr.**

The Court of Appeal observed in paragraph 18 of its judgment that:-

“18. Over the years, courts have set the threshold which has to be met if circumstantial evidence is to be relied on to prove a case to the required standard of beyond reasonable doubt. For circumstantial evidence to form the basis of a conviction, several conditions must be satisfied to ensure that it points only to the guilt of the accused to the exclusion of others. This test has previously been applied by this Court in a myriad of cases for instance in the case of Judith Achieng’ Ochieng’ v. Republic, Criminal Appeal 218 of 2006, this Court stated the law as follows:-

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:-

i. The circumstances from which the inference of guilt is sought to be drawn must be cogently and firmly established.

ii. *Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused.*

iii. *The circumstances taken cumulatively 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.*”

In other words, in order to justify a finding of guilt, the circumstantial evidence, in its totality, ought to be such that the incriminating facts lead to the unimpeded conclusion of guilt and that there are no co-existent facts that are capable of explanation upon any other reasonable hypothesis other than that of the accused’s guilt.”

20. It was Saul’s evidence in the instant case that the body of the deceased was found lying on the pathway next to Isanya’ house .He stated that the same seemed to have been dragged from the said homestead and that when Isanya was asked about it, he stated that the accused person should be asked .He to attack the deceased. In cross examination, Saul confirmed that there was no mention of the club in his statement to the police neither did he see it after its recovery.

21. APC Kirwa, the arresting officer, states that he sat in the police car while his colleagues arrested the accused person. He did not know what happened during the arrest and did not mention any club “rungu” being found at the scene. It should be noted that the investigating officer in this case did not testify neither was the alleged club produced in evidence. It was Ambani who stated that the 'club' or stick found near the deceased's body was the deceased's usual walking stick.

22. None of the other witnesses corroborated Saul’s evidence about the rungu/club.

23. In the *Stanley Muthike Tiire* case (above) the court observed that

“This issue was dealt with by the Court of Appeal in the case of Republic -V- Michael Muriuki (2014) eKLR where it was held:-

“In Sawe -V- Rep [2003] KLR 364 the Court of Appeal held:

“1. In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.

3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.

4.

5.

6.

7. Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”

In Abanga Alias Onyango V. Rep Cr. A No. 32 Of 1990 (ur) the Court of Appeal set out the principles to apply in order to determine whether the circumstantial evidence adduced in a case are sufficient to sustain a conviction. These are:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, 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.”

There is no circumstantial evidence which has been adduced in this case. No bad blood has been shown to exist between the deceased and the accused and no weapon was discovered at the accused’s home.”

24. It is thus trite that circumstantial evidence is the best evidence because of its characteristics of following a chain, leaving no gap in the chain, consistent only with the hypothesis of pointing at the guilt of the accused in exclusion to all others. Any prosecution case relying on circumstantial evidence must prove the case against the accused beyond reasonable doubt. A case founded on circumstantial evidence to hold the chain of causation must be complete, indeed so complete that there is no escape from the conclusion that the crime was committed by the accused person and him alone. See **Republic V Peter Maina Mugereki [2017] e KLR.**

25. Does the evidence on record in this case unerringly link the accused person to the offence? According to the evidence adduced, the accused person was with the deceased on the night before his death at the drinking den. There were other people present including one Isanya the owner of the drinking den and his wife. Clearly, the chain tending to link the accused person to the offence breaks as there is no

evidence from either Isanya or others who were present at the drinking den as to who hit the deceased and subsequently caused his death.

26. It is thus my considered view that the circumstantial evidence adduced by the Prosecution is not sufficient to link the accused person to the murder of the deceased.

c) Whether the accused had malice aforethought.

27. **Section 206 of the Penal Code** stipulates that malice aforethought is deemed to be established by evidence when any of the following circumstances 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.

28. In **John Mutuma Gatobu –V- Republic (2015) eKLR** The Court of Appeal stated;

“Malice aforethought in our law is used in a technical sense properly defined under Section 206 of the Penal Code.....

There is nothing in that definition that denotes the popular meaning of malice as ill will or wishing another harm and all the related negative feelings. Nor, for that matter, is it to be confused with motive as such. Our law does not require proof of motive, plan or desire to kill in order for the offence of Murder to stand proved, though the existence of these may go to the proof of malice aforethought.”

29. In **Joseph Kimani Njau –V- Republic (2014) eKLR** The Court of Appeal stated the following:-

“In all criminal trials, both the actus reus and the mens rea are required for the offence charged; they must be proved by the prosecution beyond reasonable doubt. The trial court is under a duty to ensure that before any conviction is entered, both the actus reus and mens rea have been proved to the required standard. In the instant case, the trial court erred in failing to evaluate the evidence on record and to determine if the specific mens rea required for murder had been proved by the prosecution”

In the present case, the circumstances that led to the fight between the appellant and deceased remain unclear; the motive or reason for the fight remains uncertain; it is an error of law to invoke circumstantial evidence when malice aforethought for murder has not been established. We find that mens rea for murder was not proved. Failure to prove mens rea for murder means that an accused person may be convicted of manslaughter which is an unlawful act or omission that causes death of another.”

30. Further in **Dickson Mwangi Munene & Another –V- Republic (2014) eKLR**, the Court of Appeal expressed itself thus:-

“As stated, either of these acts, intentional or reckless, constitutes malice aforethought under Section 206 of the Penal Code which is the mens rea of the crime of murder.

In a charge of murder it must be shown that the accused’s conduct caused the death. This burden is always with the prosecution to prove that the accused caused the death and that there was malice aforethought. The mens rea of murder is traditionally called malice aforethought and it connotes an existence of culpability or moral blameworthiness on the part of the accused person. In the absence of malice aforethought the unlawful killing is termed as manslaughter.”

31. In the **Stanley Muthike Tiire** case (above) the court observed that

“In a charge of murder it must be shown that the accused’s conduct caused the death. This burden is always with the prosecution to prove that the accused caused the death and that there was malice aforethought. The mens rea of murder is traditionally called malice aforethought and it connotes an existence of culpability or moral blameworthiness on the part of the accused person. In the absence of malice aforethought the unlawful killing is termed as manslaughter.”

32. The court thus held that for the charge of murder to hold against an accused person, the prosecution must prove that at the time he inflicted the injuries on the deceased he had formed the necessary intention to either cause death or grievous harm on the deceased.

33. In the instant case there is no evidence that the accused person formed any intention to kill the deceased nor is there any evidence pointing at the accused person as the one who inflicted the injuries on the deceased under whatever circumstances.

Conclusion

34. From the above analysis of the evidence and the law, I find and hold that the prosecution has failed to prove the charge of murder against the accused person herein. I therefore find the accused person NOT GUILTY of the murder of CHARLES KHANGATI MUTEKA and accordingly acquit him under **section 322(1) of the Criminal Procedure Code**. Unless the accused person is otherwise lawfully held, he is to be released from prison custody forthwith.

35. It is so ordered.

Judgment written and signed at Kapenguria.

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Kakamega on this 9th day of October, 2019

WILLIAM M. MUSYOKA

JUDGE