



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL (MURDER) CASE NUMBER 58 OF 2015

REPUBLICPROSECUTOR

VERSUS

GABRIEL ANAMI.....ACCUSED

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Introduction

The accused person herein, Gabriel Anami is charged with the offence of murder contrary to **Section 203** as read with **Section 204 of the Penal Code**, the particulars being that on the 25th day of May 2009 at Itenyi sub-location, Muranda location of Kakamega East District within Kakamega County, he murdered DAVID OTUYA SHIROKHO.

The accused person took plea on 17/9/2015 and denied committing the offence. In an effort to prove its case against the accused person, the prosecution called seven (7) witnesses as follows: Miriam Amagove as PW1 (Miriam), Sharon Khavetsa as PW2 (Sharon), Bernard Utuya as PW3 (Bernard) while Aggrey Shilokho (Aggrey) testified as PW4. Dr. Dixon Mchana Mwaludindi, the Kakamega county pathologist (Dr. Mchana) was PW5 and Felix Otuya (Felix) was PW6. Number 63708 Cpl Danston Mwasho (Cpl Mwasho) testified as PW7.

The Prosecution Case

Miriam, a farmer in Itenyi village of Muranda location testified that on 25/5/2009 at about 5.00 p.m. she was relaxing in her sitting room when she heard the sound from outside of falling metal, followed by the sound resembling a sound of a person cutting something. Though she was watching TV, Miriam stated she had put the TV at low volume. She then rushed out of the house to see what was actually happening. Outside, she saw her brother in law Gabriel Anami (the accused) bending down outside her gate. Miriam also saw the body of her father-in-law (the deceased) lying on the ground where the accused was bending over. Miriam also said she saw the deceased's bicycle which had fallen down next to where the deceased was lying down.

As she moved closer to the scene, Miriam testified she saw the accused person holding a panga in one hand while his other hand was holding the deceased by the pocket of his shirt. Miriam could see the deceased was bleeding from the head, so that sent her screaming. There were no other people around.

When he heard Miriam screaming the accused person dropped the panga where the deceased was lying and took off while carrying a small axe. The accused followed a footpath as he ran towards a river.

Miriam ran towards her mother-in-law's house but before she got there she met her mother-in-law, Esther Mutuya (not called as a witness). Miriam at once told her mother-in-law that Gabriel was killing the deceased, as the two women ran together back to the scene. By the time Miriam and her mother-in-law got back to the scene, many other people had gathered around the deceased's who was already dead. Miriam stated that when she got back to the scene, she spoke to the people who were gathered around and told them that she had seen Gabriel Anami cutting the deceased. In response to a question from the court, Miriam confirmed that the incident took place around 5.00 p.m. on the material day and that the weather was dry. She also said she had no grudge with the accused person.

In cross examination Miriam told the court that her father-in-law and father to the accused were brothers, but she could not say whether the two brothers had any grudges between them, though she was aware of a 2009 court case which involved the deceased person and the accused person herein. She confirmed that in the said case, the deceased was the complainant.

From Miriam's further evidence she was alone at home when the incident occurred and that the deceased's and accused person's homes were separated by a live fence which was about two feet high. Miriam also told the court that on the material evening, the accused person was wearing a long light green jacket, but she could not remember the colour of the trouser. She also said that she was the only eye witness of the incident.

When shown the statement she made to the police, Miriam conceded that she did not say anything about a panga in the said statement which she recorded in 2015. Miriam's statement dated 14/9/2015 was marked as DMFI – 1. Miriam testified that the police did not take away the deceased's bicycle nor had she been shown any panga during her evidence in chief. In re-examination Miriam pointed at page 3 of her statement and told the court that she had actually mentioned a panga in her statement.

Sharon testified that about 5.00 p.m. Gabriel Anami went to the deceased's home and found her standing outside the house. He then asked for deceased's whereabouts from some children who were playing in the compound. The accused person also asked her the same question and when he was told the deceased was yet to come home, he (accused person) walked away towards the gate which is the main entrance to the deceased's homestead.

After about 15-20 minutes thereafter, Miriam got to where she (Sharon) was and told her the accused person had killed the deceased. Sharon and other children from the deceased's home ran to the scene where they found the deceased lying in a pool of blood. The deceased's bicycle was also at the scene. From what Sharon could see, the deceased had been cut on the middle of the back of the head. Later the police took away the deceased's body.

In cross examination, Sharon testified that the deceased's body was lying at the gate to Miriam's home which was about 20 metres away.

PW3, Bernard is son to the deceased. He identified the deceased's body to the doctor for post mortem examination which was conducted on 26/5/2009 at the Kakamega Provincial General Hospital. Aggrey another son of the deceased was together with Bernard when the body of the deceased was identified to the doctor on 26/5/2009 for post mortem examination. Aggrey also identified some three photographs which were taken of the deceased at the mortuary.

In cross examination, Aggrey confirmed that his family and the family of the accused person had a long standing land trespass dispute issues involving the deceased's animals and chickens destroying the accused person's crops in the year 2008. Aggrey could not say whether the death of the deceased was a retaliation on the part of the accused person. His stand was that the fact that this case was in court would help the family get the truth about the death of the deceased. Aggrey also testified that when the accused person came out of jail over the land dispute case, he allegedly killed the deceased.

Felix told the court that the deceased was his grandfather and that on 25/5/2019 at about 5.00 p.m., while he was at his grandfather's home, the accused went to him and asked him (Felix) about the deceased's whereabouts. After he told him deceased had gone to Shinyalu, the accused person went up the way and as he did so, Felix saw something protruding from his clothes at the back though Felix could not say what that thing was.

Felix also testified that when the accused person saw the deceased approaching as he rode his bicycle he (accused) hid in the bushes. That is when Felix decided to follow the accused. As the deceased was passing the accused person removed something from his clothes and cut the deceased on the head. When Felix saw the accused trying to cut the deceased a second time he (Felix) started running away to the deceased's house while crying and saying "**They are cutting kuka (grandfather).**" He informed his grandmother and they both ran back to the scene. They found the deceased having fallen down. He was dead. Felix also testified that he also saw a panga and his grandfather's walking stick at the scene. Police later came to the scene and took away the deceased's body. Felix identified the walking stick and the panga as PMFI – 3 and PMFI – 4 respectively.

Felix's undated statement to the police was marked as DMFI-3. Felix denied that he had been coached on what to say to the court against the accused person.

In cross examination Felix stated that on the material evening he saw the accused person dressed in a long green jacket which had buttons. Felix also testified that the accused person found him playing ball in the open ground in the deceased's compound when he asked for the deceased's whereabouts and that at that moment Sharon and their grandmother were in the house. He maintained that it was the accused who cut the deceased on the head with a panga. In re-examination Felix denied having been coached about the evidence he gave in court.

Dr. Mchana testified and produced the post mortuary report on behalf of Dr. Richard Oreke who conducted the post mortem examination on the body of the deceased on 26/5/2009 at the Kakamega Provincial General Hospital mortuary. The body of the deceased was identified by Bernard and Aggrey. The deceased was about 77 years old.

After the examination, Dr. Oreke made the following findings: Externally the body was very pale with 2 cut wounds at the back of the skull on the right side. The top cut reached the skull, but the lower cut had lacerated the brain, with resultant bleeding into the right brain.

In the doctors opinion the cause of death was severe head injury caused by a sharp penetrating trauma. The duly signed, certified and dated post mortem report was produced as Pexhibit 2.

In cross examination, Dr. Mchana agreed with defence counsel that the name and stamp of the police station which requested for the post mortem examination was not indicated on the form and further that there was no OB number on the form. Dr. Mchana also testified that the postmortem form was not signed by a police officer as expected. There was also no date at the bottom of the form.

Dr. Mchana also testified that from the injuries noted, the attack on the deceased was from behind and were inflicted by a right handed person and that the attacker was either taller than the victim or the victim was in a lower position.

Cpl Mwasho was the last prosecution witness. He testified that on 25/5/2009 at around 18.30 hours, he received instruction from the OC crime Acting Inspector of police Pauline Mwangi to visit the murder scene at Itenyi area. He did so in the company of PC Benson Oluoch, PC Birgen and PC driver Korir together with the OC crime. On arrival at the scene they found a crowd of people around the body of the deceased. The deceased's body had 3 deep cut wounds on the head. Beside the body was a panga a walking stick and a bicycle which were lying on the ground. There was also a hat. The deceased's body was lying some 50 metres from his house.

Cpl Mwasho also testified that they collected the body and took it to Kakamega Provincial General Hospital to await post-mortem. While at the scene, the police officers were informed that the accused person had escaped after the alleged offence.

On the 3/9/2015, Cpl Mwasho got information that the accused person had been sighted at Mukulusu area erecting a fence. He rushed to the place where the accused person was said to be working and arrested him, and took him to Shinyalu police station. Later on the accused person was handed over to Kakamega police station and charged with murder.

Cpl Mwasho produced the walking stick and panga recovered from the scene as Pexhibits 3 and 4 respectively. Cpl Mwasho then stated that on the strength of statements recorded from witnesses, he was satisfied that the accused person herein committed the offence. Cpl Mwasho also testified about an assault case report to Shinyalu police station under OB/65/22/04/2009 involving the accused person and a son of the deceased and added that the accused person who was the accused in the said assault case absconded after being granted bond. The case was eventually withdrawn under Section 87 (a) of the Criminal Procedure Code.

During cross examination, Cpl Mwasho conceded that he did not carry a police notebook with him when he visited the scene though it is a requirement for police officers to do so. Cpl Mwasho also conceded that his statement did not indicate that the panga recovered at the scene had blood stains, nor did it mention the recovery of a white hat at the scene. He also testified that from the witness statements he recorded, which excluded Miriam's, Sharon's and Felix's statements recorded in 2015, none of the witnesses stated they saw the accused person cutting the deceased with an axe. Cpl Mwasho also testified on re-examination that he could not produce the deceased's blood stained white hat because he could not find it at the exhibit store.

The Defence Case

At the close of the prosecution case, the accused person was put on his defence. He elected to give sworn evidence. He also called one witness. The accused stated that on 25/5/2009, when the alleged murder took place, he was in Nairobi and could therefore not have killed the deceased. The accused person told the court that Miriam's testimony was a lie. He also testified that when he got news of the deceased's death he planned and attended the funeral and then returned to Nairobi. Then on 2/9/2015, he was arrested as testified to by Cpl Mwasho. He however questioned the allegation that the panga produced in court is the one he allegedly used to kill the deceased. The accused person also denied the allegation that he had any grudge with the deceased. He stated he was in Nairobi building a house for DW2 Abung'ana Khasiani Khan.

When cross examined the accused stated the work he was doing for DW2 was completed by end of 2008. He could not say what caused the death of deceased.

Abung'ana Khasiani Khan DW2 confirmed the accused person whom he had known for more than 35 years worked for him during construction of his house in Ruai, Nairobi and that the work was completed sometime in 2012. It was DW2's testimony that as at 25/5/2009 the construction work was still in progress and the accused person could therefore not have been in Kakamega killing the deceased.

DW2 also testified of the accused person's arrest on 2/9/2015 while putting up a fence on his (DW2's) tea firm in Mukulusu area of Shinyalu. He also testified that the work the accused used to do for him, was under oral contracts.

Submissions

At the close of the defence case, defence counsel, Mr. I. Ondieki, submitted that the prosecution case cannot stand in the face of the formidable alibi defence put up by the accused person. Counsel urged this court to find that the prosecution case against the accused person has not been proved beyond reasonable doubt to warrant a conviction of the accused person.

Prosecution counsel Mr. Juma submitted that the state wholly relied on the evidence on record.

Issues for Determination

Sections 203 and 206 of the Penal Code set out the ingredients that must be proved by the prosecution before a court can convict an accused person of the offence of murder. These ingredients are:-

- a. Fact of death of the deceased.*
- b. Cause of such death.*
- c. Proof that the death occurred as a result of an unlawful act or omission on the part of the accused.*
- d. Proof that in carrying out the unlawful act or omission, the accused person did so with malice aforesight.*

In **Republic -vs- Ndalama & others [2003] KLR 638**, the court held, inter alia that:-

“For the offence of murder, malice aforethought is deemed to be established by evidence showing knowledge that the act or omission causing death or grievous harm will probably cause death or grievous harm to some person whether that person is actually killed or not although such knowledge is accompanied by the indifference whether such death or grievous harm will occur.”

Analysis and Determination

After hearing all the 7 prosecution witnesses together with the accused person and his only witness and after carefully analyzing the said evidence I now move to consider the issues.

a. The fact and cause of death of deceased

There is no doubt in this case that the deceased herein died. All the witnesses and even the accused person testified of the fact that the deceased died. Benard and Aggrey sons of the deceased, told the court that they are the ones who identified their father's body to Dr. Oreke for the post mortem examination. Miriam too the deceased's daughter-in-law also testified of the fact of the deceased's death.

As to the cause of death, Dr. Mchana, testifying on behalf of Dr. Oreke produced the post mortem report – Pexhibit 2 in which it was indicated that the cause of death was severe head injury caused by a sharp penetrating trauma. In further evidence, Dr. Mchana testified that the probable weapon used to cause, the deep cuts on the head of the deceased was a panga because the edges of the wounds were fairly uniform.

b. Whether there was malice aforethought

In this case, the post mortem report showed that the cuts inflicted on the back of the deceased's head were deep with the top cut reaching the skull and the lower cut lacerating the brain. In my considered view whoever inflicted those cuts had the intention of either killing or causing grievous harm to the deceased, and such intention satisfies the provisions of **Section 206 of the Penal code**, and as was held in **Republic -vs- Ndalama (supra)** the evidence in this case shows that whoever inflicted the injuries on the deceased knew that such an act would cause death or grievous harm.

c. Was it the accused person herein who cut the deceased on the head and killed him

The accused person gave an alibi defence saying that he was in Nairobi building houses for DW2. DW2 testified that the accused person has worked for him even a long period of time, including the material date of the alleged offence. However, after carefully considering the defence against the prosecution evidence, I find and hold that he alibi defence does not have any weight in the face of testimonies given by Miriam, Sharon and Felix.

The incident took place at 5.00 p.m., which was daytime. Miriam testified that as she relaxed in her house, she heard the sound of falling metal which was quickly followed by the sound of something being cut. As she dashed out she saw the accused person bending down beside her gate. As she moved closer she saw the deceased lying down right there where the accused person was bending. Miriam also saw the deceased's bicycle which had fallen down next to where he was lying down. The accused had a panga in the hand.

Sharon also testified that on the material just before the deceased was cut, the accused went to the deceased's home and enquired about his whereabouts. When the accused person was told that the deceased was not yet home he walked away and some 15-20 minutes later, Sharon was informed by Miriam that the accused person had killed the deceased.

Felix also testified that on material day at around 5.00 p.m. the accused person approached him as he played and asked him where “**kuka**” (grandfather) was. Felix stated that the deceased was his grandfather. When Felix told the accused person the deceased was at Shinyalu, he (accused person) left. Felix said he followed the accused person, and also saw the deceased approaching, as he rode his bicycle. The accused person then hid in the bushes near Miriam's house and as the deceased passed near where the accused person was hiding, the accused person pounced on the deceased and cut him on the head twice from behind.

The testimony by Felix as to how the attack took place agrees with Dr Mchana's testimony that the attack on the deceased was from behind.

I am therefore satisfied that Miriam, Sharon and Felix all placed the accused person at the scene of crime on the material day. I am also satisfied that there was no mistaken identity of the accused person who is a member of the family of Miriam, Sharon and Felix.

During cross examination, defence counsel tried everything possible to punch holes in the testimonies of Miriam, Sharon and Felix, and particularly the testimony of Felix whom he alleged had been coached to say what he said in his evidence. Having seen Felix testify both during his evidence in chief and during cross examination, I have no doubt in my mind that Felix was an honest and very stable witness.

The defence also questioned the veracity of the post mortem report and pointed out that there are many gaps therein that make it unbelievable. It is true that there are certain gaps in the post mortem report such as absence of the name of the police station originating the form, absence of an OB number and so forth. These gaps are the result of poor work on the part of the investigating officer, but it has been held that even in the absence of medical evidence in the form of a post mortem report, such as where the body of the deceased was burnt beyond recognition, proof and cause of death can be proved by other evidence. I am satisfied that the eye witness accounts of Felix and Miriam satisfactorily prove the fact of death and cause of death of the deceased.

Conclusion

From all the above analysis I am satisfied that the prosecution in this case has proved the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code against the accused person beyond reasonable doubt.

Accordingly I find GABRIEL ANAMI SHIKOTO **guilty of the murder** of DAVID OTUYA SHIROKHO on 25/5/2009 and **convict him of the same** under **Section 322 (1) of the Criminal Procedure Code**.

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